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Supreme Court of the United States

OCTOBER TERM, 1931

No. 826

ED SPROLES, et al,
Appellants.

vs.

T. BINFORD, Sheriff of Harris County, Texas, et al,
Appellees.

ON APPEAL FROM A STATUTORY THREE-JUDGE COURT, CONVENED IN THE SOUTHERN DISTRICT OF TEXAS

BRIEF ON BEHALF OF APPELLANTS.

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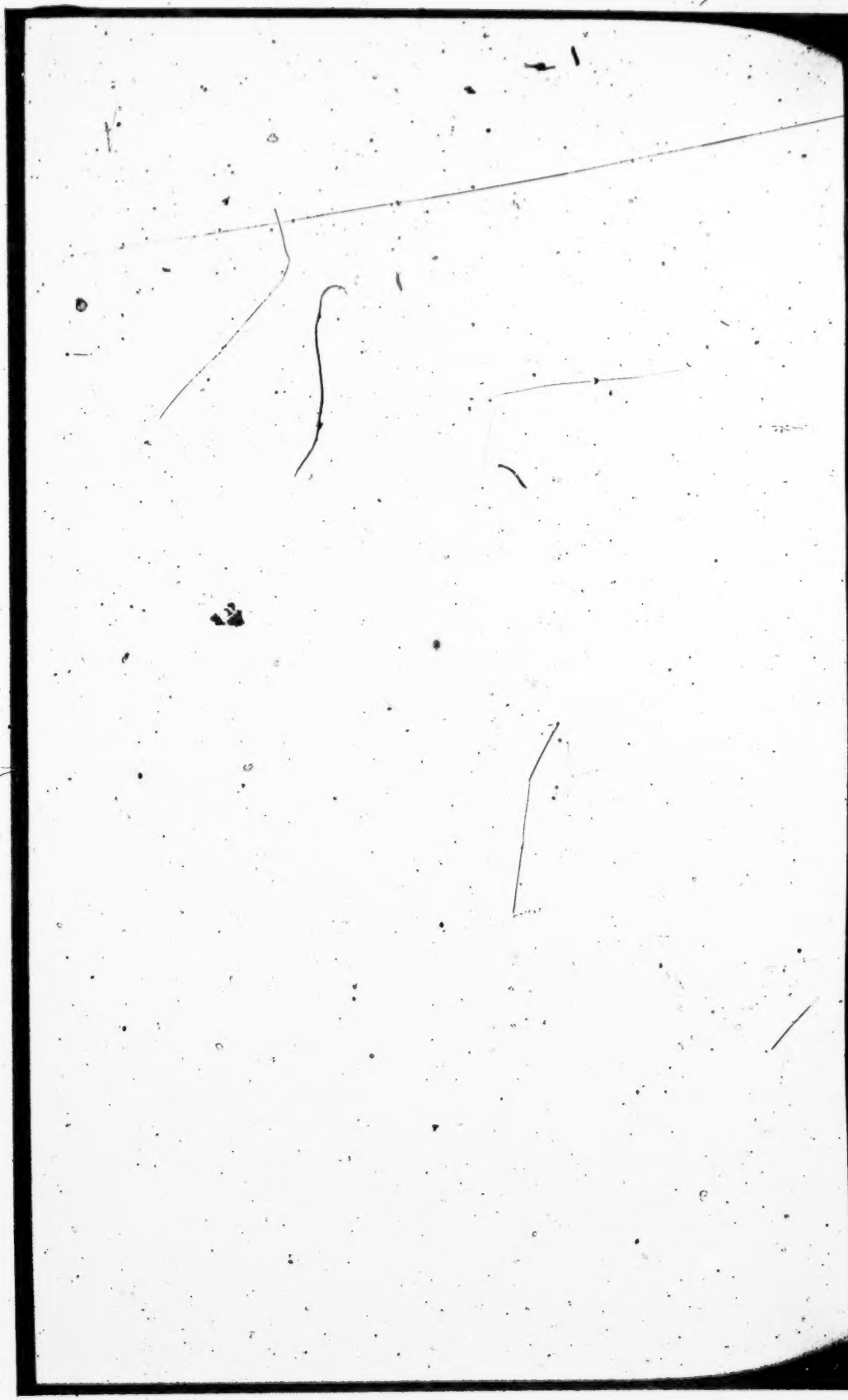

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POINT I. Section 5 of said Act, fixing a seven thousand (7,000) pound net load limit on trucks, is an unreasonable and arbitrary regulation, having no substantial relation to highway protection; and deprives appellants of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. 18

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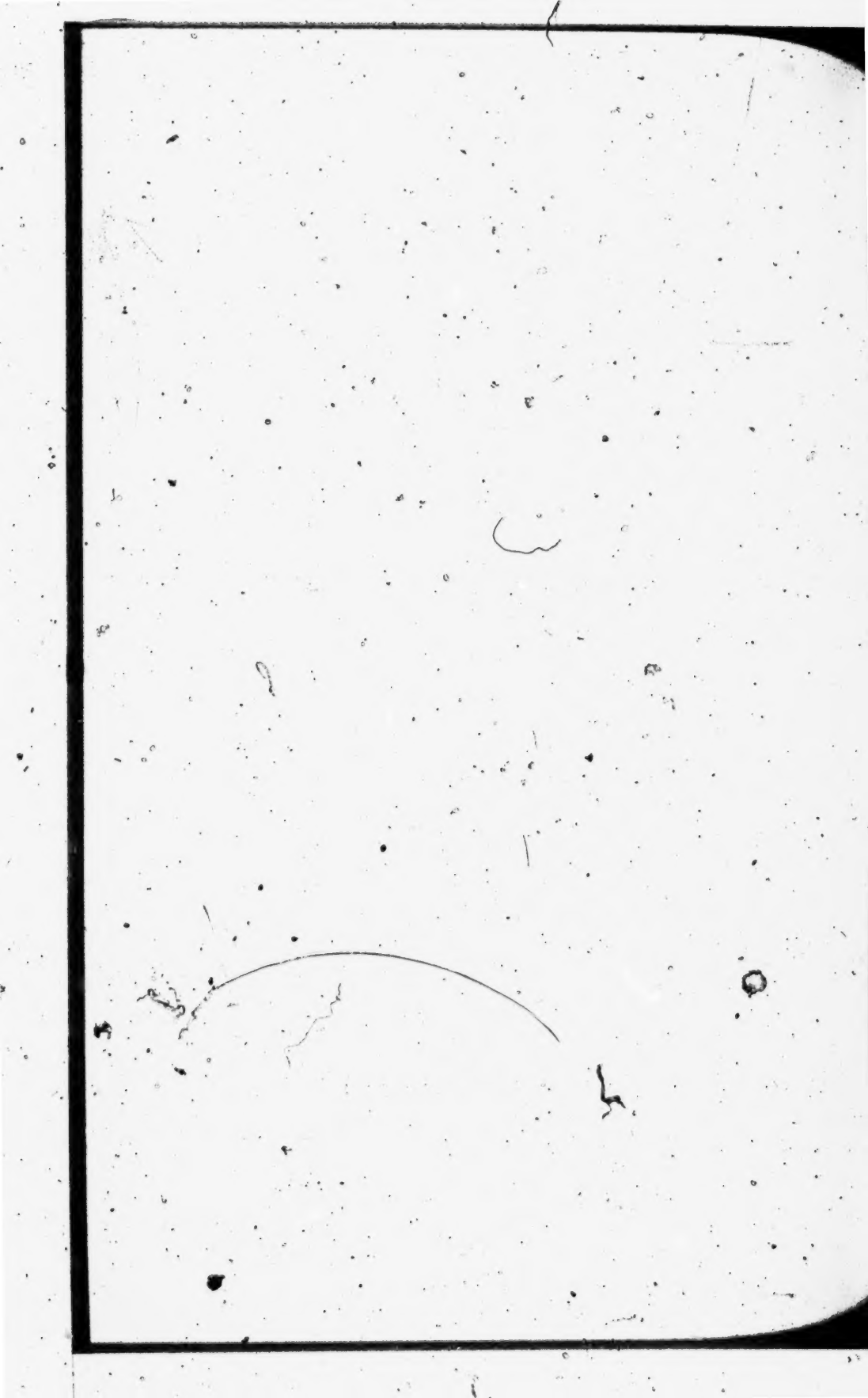

Supreme Court of the United States

OCTOBER TERM, 1931

No. 826

ED SPROLES, et al, *Appellants.*

vs.

T. BINFORD, Sheriff of Harris County, Texas, et al,
Appellees.

On Appeal From a Statutory Three-Judge Court, Convened in the Southern District of Texas

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BRIEF ON BEHALF OF APPELLANTS*

OPINIONS BELOW

The opinion of the Statutory Three-Judge Court, convened under the provisions of Section 266 of the Judicial Code, as amended by the Act of February 13, 1925, (c. 229, P. 1, 43 Stat. 938; Title 28, Section 380, U. S. C. A.), on the application for a temporary injunction is reported in 52 Federal (2d) 730, appearing in the Record at pages 103 to 116, and the final opinion of the Court denying the application for permanent injunction and dismissing the petition

*Indications of emphasis herein are ours unless otherwise indicated.

for want of equity, is not yet officially reported, but appears in the Record at pages 119 to 125.

JURISDICTION

The final decree of the Statutory Three-Judge Court, convened by District Judge T. M. Kennerly in the Southern District of Texas, was rendered on December 31, 1931, opinion filed January 27, 1932. (R., 125; R., 119). The application for appeal from such decree was filed and the order allowing the appeal was entered March 19, 1932. (R. 147). The case was docketed in the Supreme Court on March 25, 1932, being cause No. 826 on the docket of this Court.

Probable jurisdiction was noted by this Court (not yet officially reported, but order entered March 28, 1932).

The complaint below, and the respective intervention petitions, alleged that certain provisions of House Bill 336, Chapter 282, Acts of the Regular Session of the 42nd Legislature of Texas, effective August 22, 1931, and particularly Section 2, Section 3 and Section 5 thereof, were invalid on the grounds of being repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States relating to regulation of Commerce among the several states, and to Article 1, Section 10, Clause 1, of the Constitution of the United States relating to the impairment of contracts, and to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The sections attacked were statutory provisions limiting the length of vehicles and the net load that may be transported by motor trucks on public highways of the State of Texas. The rulings made were that said Texas statute is valid and not repugnant to the Constitution or laws of the United States, (R., 119, 126) and the final decree of the Court dissolved a temporary injunction theretofore issued, denied a permanent injunction and dismissed the petition for want of equity under order signed by all three judges. (R., 125.)

The jurisdiction of this Court is invoked under the Act of February 13, 1925 (c. 229, 43 Stat. 938), entitled "An Act to Amend the Judicial Code and to Further Define the Jurisdiction of the Circuit Courts of Appeal and of the Supreme Court and for Other Purposes," and appeared under Section 238 of the Judicial Code, as thus amended, providing, in part that:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections and not otherwise:
>
> "• • •
>
> "(3) Section 380 of this Title." (U. S. C. A. Title 28, Section 345).

As this suit was originally brought under Section 266 of the Judicial Code, as amended by Act of February 13, 1925 (Title 28, Section 380, U. S. C. A.), and as the Three-Judge Statutory Court denied a permanent injunction, a direct appeal was taken to the Supreme Court of the United States. At the time the decree was entered, the Trial Court granted a temporary injunction restraining Appellees from enforcing the provisions of Section 5 of the law in question, pending appeal to the Supreme Court of the United States, and this injunction, by its terms, expires June 6, 1932. Under Rule 46 of the Rules of this Court, effective July 1, 1928, and under Title 28, Section 380, U. S. C. A., this appeal may be properly considered by the Supreme Court of the United States.

STATEMENT OF THE CASE

The Legislature of the State of Texas enacted House Bill 336 regulating the operation of vehicles on the public highways of Texas. (Chapter 282, approved June 11, 1931, General Laws, Forty-second Legislature, Page 507) (This brief, Appendix A). The Act was passed as an Amendment of Chapter 42, General Laws of the State of Texas, Forty-first Legislature, Second Called Session, approved July 3, 1929 (This brief, Appendix B).

The sections of the Act which are important in considering this case are:

Section 2. Prohibits the operation of any vehicle on the highways exceeding the limitations of size stated in the Act and forbids the transportation of any load exceeding the dimensions or weight prescribed in the Act. It provides that the State Highway Department, through designated agents, may grant ninety-day permits for the transportation of "such overweight or oversize or overlength commodities as can not be reasonably dismantled," and may issue like permits for oversized equipment to transport such commodities (R. 9).

Section 3. Limits the width of vehicles to ninety-six (96) inches, the height of vehicle and load to twelve and one-half (12½) feet, the length of vehicle to thirty-five (35) feet, and a combination thereof (such as truck and trailer) to forty-five (45) feet; and it forbids the transportation, as a load or as part of a load, of any commodity boxed or bound in containers having more than 30 cubic feet and weighing more than 500 pounds where there are more than fourteen of such containers carried as a load on any vehicle or combination thereof; and in no event can a load of such containers be carried in excess of 7,000 pounds in weight. Exemption from the size limitations imposed on vehicles is given to:

(a) Implements of husbandry, including water well drilling machinery;

(b) Highway maintenance and building machinery temporarily moved upon the highway (R. 10).

Section 5. Forbids any **commercial motor vehicle** (not passenger buses) or combination of vehicles from carrying any load exceeding 7,000 pounds outside of an incorporated city; and provides that no **motor vehicle** (including passenger buses) shall have a greater weight than 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway. (R. 12.) The exemption of passenger buses is made by virtue of the definition of "commercial motor vehicle" made in Section 1 (R. 9), such being defined as a vehicle used to transport **property.**

Section 7. Provides that the foregoing limitations as to **length** of vehicle or combination of vehicles and **weight of loads** and of **height** of vehicle with load shall **not apply** to vehicles when:

(a) Transporting property from point of origin to **nearest practicable** common carrier receiving point;
(b) Transporting property from common carrier unloading point by way of shortest practicable route to destination, provided no common carrier receiving point **equipped to transport** the load is passed en route;
(c) Transporting property from point of origin to point of destination when the destination is less distant from the point of origin than the nearest practicable common carrier receiving point **equipped** to transport such load.

The limitations imposed on this **preferred class** of transportation are:

(a) Vehicles must not exceed **55 feet** in length. (No limitation on length of combinations.)
(b) Such vehicle must not carry more than 14,000 pounds.
(c) The gross weight must not exceed 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway. (R. 12.)

It will be noted that such sections (This brief, Appendix A) make drastic changes in the old law (This brief, Appendix B), which was in line with the average restrictions generally imposed by the various states. (R. 243-244.)

The more drastic changes were:

1. Giving discretionary authority to highway department agents to grant 90-day permits for loads that can not be reasonably dismantled regardless of the effect of such movement on the highway.
2. Reducing the length of combinations from 65 to 45 feet, not, however, applying this restriction to **certain designated classes.**
3. Regulating commodities transported in **certain kinds of boxes or containers** in a manner different from those not so boxed or bound.
4. Limiting the cargo or net load of **trucks**, without restricting that of **buses**, whereas, gross weight and its proper distribution to axles and tires, (uniformly applied to all vehicles), characterized the former law.
5. Granting **special exemptions** to those transporting to and from common carrier receiving or unloading points.

All provisions of the new law became effective August 22, 1931 (R., 15), except the weight restriction which became effective January 1, 1932 (R. 12).

The Appellant, Ed. Sproles, a common carrier, engaged under the name of Sproles Motor Freight Lines, in transporting commodities in motor vehicles over the highway of Texas, filed his bill of complaint against James V. Allred, Attorney General of Texas, and numerous other law enforcement officers of the State, including T. Binford, Sheriff of Harris County, and a resident of the Southern District of Texas, wherein the suit was filed, to enjoin the enforcement as to him of the length and weight restrictions of the aforesaid Act (R., 1-31). He charged that such length and weight restrictions, contained in said Act, violated, as to him, the equal protection and due process clauses of the 14th Amendment, and were repugnant to Paragraph One

Section Ten of Article 1 of the United States Constitution, asked for temporary restraining order, interlocutory injunction pending trial, and permanent injunction upon final hearing.

By permission of the court there intervened herein the John B. Barbour Trucking Company, a contract carrier of oil field equipment and machinery; the Tennessee Dairies, Inc., a purchaser and distributor of dairy products; Southern Transportation Company, Inc., a common carrier engaged in both intra and interstate commerce; the Yellow Cab Transit Company, a common carrier engaged exclusively in interstate commerce; the Wichita Falls Motor Company, a manufacturer of heavy duty trucks; the Bull-Stewart Equipment Company, Inc., a contract carrier engaged in distributing Ford cars; Western States Grocery Company, Inc., a wholesale merchant distributing its commodities by truck; Empire Transportation Company, a contract carrier; and W. T. Stevens, a contract carrier of uncompressed cotton. (Original record, 38-114) (R., 31-56.) Each of said interveners set up the unconstitutionality of the length and weight restrictions of said Act as applied to him. The Act was particularly attacked by the Yellow Cab Transit Company and the Southern Transportation Company on the additional grounds that same imposed a burden on interstate commerce contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States (R., 54) (Original Record, 41). W. T. Stevens particularly attacked the "box and container" provision, Section 3(f), as repugnant to the 14th Amendment to the Constitution; and several Interveners, as well as Complainant, Ed. Sproles, attacked the length and weight provisions on the ground that they impaired the obligations of contracts contrary to Article 1 of the United States Constitution. (R., 1-56.)

The Respondents answered the original Bill of Complaint (R., 61) and the several Petitions of Intervention (Original Record, 121-201) (R., 83-101), replying specifically to the several paragraphs thereof, denying the alleged discrimin-

ations, the unreasonableness of the Act, the alleged burden on interstate commerce, the alleged delegation of legislative authority, the alleged impairment of contracts and specifically pleading justification for the classifications and restrictions of the Act.

A temporary restraining order was issued on the length restrictions (Section 3(c)), but an application for temporary injunction, made before a Three-Judge Court, was denied, except as to the enforcement of Section 3(f), the "box and container" provision. (R., 116.) The court's opinion was rendered by District Judge Kennerly (R., 119). On final hearing the Three-Judge Court declined to grant a permanent injunction and dismissed the bill and all Intervention Petitions for want of equity (R., 125), but, on application, granted an injunction against the enforcement of Section 5 (weight restriction) pending appeal and final determination of the case by the Supreme Court of the United States. (Original record, 702, 737.) At a later hearing the **expiration date of the stay order was fixed as June 6, 1932,** it being the trial court's opinion that this court could finally determine said cause by that time. (Original record, 737.)

The Trial Court made certain findings of fact and conclusions of law (R., 126) which were assailed by appellants in their Assignments of Error (R., 141) presented to the court at the time this appeal was allowed (R., 147).

In brief, the Trial Court found no discriminations in the Act, no arbitrary and unreasonable regulation, no delegation of legislative authority and no undue burden on interstate commerce; and therefore concluded that the Act was a valid regulation for the protection of the highways. These findings and conclusions of the learned Trial Court are attacked in this appeal as not justified by the evidence or the law (R., 126-140).

The Trial Court further found in substance, that the Complainant and Interveners had invested in their respective businesses the large sums alleged; that their businesses

were conducted as alleged; that they could not conduct their business at a profit under a restricted load limit of 7,000 pounds; and that the further operation of all such type of equipment as that owned by Complainant and Interveners would be at a loss to themselves; and that said parties would **sustain substantial** losses under **prior contracts** made at a time when said equipment could be profitably used. It further found that the interstate operations of Yellow Cab Transit Company and Southern Transportation Company could not be conducted under such weight restriction except at a substantial loss; that the adjoining states served by Yellow Cab Transit Company had laws under which net cargoes of 32,000 pounds could be transported on the same vehicles to which Texas applied a limit of 7,000 pounds. It further found that **all parties** in their respective **businesses**,—common carriers, contract carriers, individual owners, manufacturers, etc.—would sustain **large financial losses**, and serious inconvenience under the restrictions of the Act. **These findings were in support of appellants allegations of irreparable injury** (R. 126-136).

The Court justified the **weight and length** restrictions on the grounds of (a) reducing traffic, (b) saving in maintenance costs, (c) greater safety to travelling public, (d) serving public convenience, and (e) reducing gross load, thus upholding the Act as a valid highway regulation (R., 134-137).

It is appellants' contention that such justification can not be found from the terms of the Act or the natural and probable result which will attend its enforcement.

SPECIFICATIONS OF ERROR

The detailed specifications of error (all of which are intended to be urged here) are set forth in the Assignments of Error (R., 141-147). They challenge those findings of the court upon which the court bases its ultimate conclusion that the Act in question is a valid exercise of the State

police power under which it has the right to regulate the dimensions of motor vehicles and the loads transported thereon over the highways of Texas.

It is contended that:

1. Section 5 of the Act is repugnant to the due process clause of the Fourteenth Amendment.
2. Section 5 of the Act is repugnant to equal protection clause of the Fourteenth Amendment.
3. Section 5 of the Act imposes an undue burden upon interstate commerce.
4. Section 3 (f) of the Act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.
5. Section 3 of the Act is repugnant to the equal protection clause of the Fourteenth Amendment.
6. Section 2 of the Act contains an unauthorized delegation of power to suspend a statute contrary to the Texas Constitution and Clause one of the Fourteenth Amendment to the United States Constitution.
7. The hearsay testimony of the witness George Knapp, relating to the capacity of Texas bridges, was erroneously admitted.
8. Sections 5 and 3 of the Act are repugnant to Paragraph One, Section Ten of Article One of the Constitution of the United States.
9. The Sections of the Act relating to weight and length restrictions are inseverable.

SUPPLEMENTAL STATEMENT

The Court's attention is respectfully directed to the following stipulation of the parties:

> In Complainant's and Interveners' Petitions there are allegations of fact as to the general business in which each is engaged, the number of vehicles owned by each, the volume of business transacted, and the nature and extent thereof, and the amount of the investment, and the effect of House Bill 336 upon such businesses. It is agreed that each of the parties verifying said petitions will testify that such facts are true and that such testimony may be transcribed into the record as the testimony of such witnesses.

In construing said stipulation, the Court ruled that the record should show that witnesses testified by affidavit and were not subjected to cross-examination, except certain expert witnesses, as hereinafter shown, testified by affidavit and were thereafter tendered for cross-examination.

The Court ruled that nothing in the stipulation of the parties would limit the effect of the testimony or make it any less available to the parties because it came in by affidavit than if the witness were present in court testifying under oath as is customary, and that the affidavits would be used simply in lieu of oral testimony by the witness in court, and that in each instance the record would reflect whether or not there was cross-examination. (R. 149.)

SUMMARY OF ARGUMENT

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the Constitutional provision."

Mr. Justice Sutherland in Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32, 37.

This general brief is filed on behalf of all Appellants, including Complainant as well as the interveners in the lower court. A separate Brief is being filed herein on behalf of Intervener, Tennessee Dairies, Inc., and Intervener, W. T. Stevens. The latter deals exclusively with Point Four (4) whereby the invalidity of Section 3 (f), the "box and container" section, is challenged. To both of these Briefs the attention of the Court is respectfully directed.

I. Section (5) Five of the Act, fixing a seven thousand (7,000) pound net load limit on trucks, is an unreasonable and arbitrary regulation, having no substantial relation to highway protection; and deprives appellants of their property without due process of law, contrary to the Fourteenth Amendment of the Constitution.

The following facts demonstrate its unreasonableness:

(a) This provision repealed an old law which was truly designed to protect the highways from superheavy loads. (This brief, Appendix B.) In some instances, namely, with respect to passenger busses, it actually permits heavier gross loads.

(b) It places the heaviest traffic upon the cheapest constructed portion of the State highway system—the part least able to bear it. This is done by virtue of the privileges extended under Section 7. (R. 170.)

(c) When gross weight is restricted by the 600 pounds per inch of tire spread upon the highway, there is left a sufficient margin to carry greater cargoes than 7,000 pounds without any damage to the highway (R., 187).

(d) Highway damage from overweight can **only** be prevented by regulations which fix a maximum **gross load** and provide for its proper distribution through axles and wheels to the highway surface. (R. 187, testimony of Thomas H. McDonald, Chief of the United States Bureau of Public Roads, Department of Agriculture, Washington, D. C.)

(e) This act substantially destroys the value of approximately $150,000,000 of property and the businesses of many citizens who have spent a lifetime in its development. (See Stipulation R. 149, complainant and interveners allegations R. 1-61) (Findings of the Court, R., 126).

(f) This act is out of line with the established standards of weight throughout the United States. (R., 243.)

(g) It is contrary to every principle of sound engineering opinion, which teaches that the problem of highway damage from weight must be solved by regulating the wheel load under a restriction of certain permissible weight to the inch of tire spread upon the highway. (R., 187, 190, 193, 195, 208 221, 226, 227, 246.) Only one state in the Union, to-wit., Oregon, fixes **less than** 600 pounds to the inch of tire spread upon the surface of the highway. There the limit is five hundred (500) pounds.

(h) While permitting the use of vehicles thirty-five (35) feet in length and in combinations forty-five (45) feet in length, having a height of twelve and one-half (12½) feet, and a width of ninety-six (96) inches, it does not allow the economical use of this space, as seven thousand (7,000) pounds is far below the safe load capacity of such vehicles. (R., 205-206, 210, 218.)

(i) It is an apparent effort to throttle the economic advance of transportation by hampering a business (truck transportation) for the advantage and profit of its competitor (the railroads). (R., 218.)

(j) An arbitrary selection of a net load limit without considering any other related factors does not, as a prac-

tical matter, accomplish any public benefit. R. 226, 228, 170-172, 176-183.)

A law may be so unreasonable and arbitrary as that it will be declared unconstitutional as violating the due process clause of the Fourteenth Amendment. Heiner v. Donnan, 76 L. Ed. 501; McLeaish & Co. v. T. Binford, et al., 52 Fed. (2nd) 151 (affirmed by United States Supreme Court (Mem.) 76 L. Ed. 267).

I.

II. Under Section 7 of the Act, the privilege of transporting greater loads than seven thousand (7,000) pounds is accorded to others who operate under substantially the same conditions as Appellants; and no load limit is imposed on **commercial busses** operating under substantially the same conditions as Appellants' trucks. This is discrimination forbidden by the Fourteenth Amendment to the Constitution of the United States, and falls in the category of that type of legislation condemned in Smith v. Cahoon, 51 S. Ct. 582, 75 L. Ed. 1264. Therefore Section 5 of the Act is invalid.

III. As to interstate operators, Section 5 of said Act is null and void, because a net load limit of seven thousand (7,000) pounds is an undue burden upon interstate commerce, and **such restriction has no fair and reasonable relation to the objects of the Act**, and is therefore repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States, relating to the regulation of commerce among the States. If this type of legislation be sustained, one engaged in interstate commerce must be prepared to vary his load at each state line. This will lead to endless confusion and tremendous expense. **It will virtually stop interstate transportation by truck.** (See stipulation R. 149; Yellow Cab Transit Company allegations, R. 54, and proof, R. 248, R. 190; and findings of fact, R. 128). This Court has consistently held that states can

not regulate interstate commerce in subjects national in character and which admit and require uniformity of regulation affecting alike all the states. Texas' problems relating to truck transportation by interstate operators, so far as the matter of length and weight of vehicles are concerned, are no different from those of other states. Hall v. DeCuir, 95 U. S. 485; De Santo v. Pennsylvania, 273 U. S. 34; Buck v. Kuykendall, 267 U. S. 307; Louisville & Nashville R. Co. v. Eubank, 184 U. S. 24, 46 L. Ed. 416. A state may not in any form or under any guise directly burden the prosecution of interstate business. International Text Book Co. v. Pigg, 217 U. S. 91, 27 L. R. A. (N. S.) 493.

IV. Subdivision (f) of Section 3 of said Act creates a classification which is unreasonable, arbitrary and discriminatory, and without any substantial relation to the purposes of the Act, thus violating the equal protection and due process clauses contained in the Fourteenth Amendment to the Constitution of the United States:

(a) In making a distinction between commodities which are boxed or bound in containers or binders and those not so boxed or bound; and,

(b) In making a distinction between commodities which are boxed or bound in bales or packages of thirty cubic feet or more in bulk and weighing more than five hundred (500) pounds and those boxed or bound in bales or packages of less bulk and weight.

This point is separately briefed for Intervener W. T. Stevens and to such brief we respectfully refer the court.

V. Trucks which are used as an incident to the business of farming are implements of husbandry. Allred v. Engelman, 40 S. W. (2nd) 945 (writ of error denied by Supreme Court of Texas). They make like use of the highways to that made by Appellants. **This Act does not limit their size.** Under the conditions named in Section 7 of the Act, vehicles are not restricted to the length limitations imposed

by Section 3. They may be 55 feet in length, while appellants' vehicles are restricted to 35 feet. Both make like use of the highways. This is a discrimination which is repugnant to the Fourteenth Amendment, as held in the case of Smith v. Cahoon, supra, and renders Section 3 invalid.

VI. By section (2) Two of the Act the Highway Department representatives are granted **authority** to issue ninety (90) day permits to transport commodities that cannot be reasonably dismantled; they have the right to authorize the use of oversized equipment in transporting such commodities. No one has the right, under Section 2 of the Act, to **require** these representatives to give such a permit, whatever may be the character of the commodity he desires to transport. The right **to give the permit** is left to the **sole discretion** of such representatives. This is a delegation of authority not permissable under the provisions of the Fourteenth Amendment to the United States Constitution or under Section 28, Article One, of the Texas Constitution. Washington v. Roberge, 278 U. S. 116; 73 L. Ed. 210. This permit clause being void, there is, therefore, an express inhibition against transporting any load over 7,000 pounds in weight without any valid provision for moving such articles, like oil-field boilers, as can not be reasonably dismantled. This section is so essential to the whole tenor of the Act relating to weight and length restriction as to render such restrictions null and void.

VII. George Knapp, an expert witness, called by appellees, was permitted to testify as to the capacity of various Texas bridges to sustain certain loads (R., 272). It was objected that his testimony was purely hearsay and therefore not admissible (R., 272). He admitted that his source of information was an examination of certain records in the Highway Department which were compiled from reports submitted by various Highway Department employees. He

knew nothing of his own knowledge about the facts or the correctness of the records. It is obvious that such testimony, damaging in character, was inadmissible over the appellants' objection.

VIII. Sections 5 and 3 of said Act are invalid because they impair the obligation of contracts, in violation of Paragraph One, Section Ten of Article 1 of the Constitution of the United States, in that appellants cannot comply with the obligations of valid contracts entered into prior to the passage of said Act, on account of the unreasonable length and weight restrictions imposed by said Sections.

Prior to the enactment of H. B. 336, complainant and certain interveners had entered into contracts for the transportation of various commodities over the highways. For example, Bull-Stewart Equipment Company, Inc., had a contract to distribute Ford cars. (R., 129.) These contracts were based on the assumption that certain loads were legal (R., 129). The State of Texas had issued to Appellants licenses for the current year (R., 126). Under these licenses for their particular equipment, such contracts could be fulfilled at a profit. Under the weight and length restrictions of this Act, the value of the contracts are destroyed (R., 127) and Appellants can be required to perform at a serious financial loss. This is an impairment of valid contracts by unreasonable and arbitrary restrictions.

IX. Sections 2, 3, and 5 of the Act are inseverable. If any one be not valid, or if they be invalid as to interstate carriers, all must be declared void, as contrary to legislative intent. Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Williams v. Standard Oil Co. of La., 278 U. S. 235, 73 L. Ed. 287.

POINT I.

Section 5 of said Act, fixing a seven thousand (7,000) pound net load limit on trucks, is an unreasonable and arbitrary regulation, having no substantial relation to highway protection; and deprives appellants of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court will note that Section 5 of the former Texas law (This brief, Appendix B) was scientifically designed to secure protection of the highway from super-heavy transportation. Maximum gross load for a four-wheel vehicle was 22,000 pounds; six wheels, 30,000 pounds, (axles of this type of vehicle to be spaced over 40 inches apart); and no vehicle could carry a gross weight of more than 16,000 pounds on any one axle, or use the highway while carrying a gross weight of more than 700 pounds per inch width of tire upon any wheel concentrated upon the highway surface. When the axles were spaced less than 8 feet apart, the load on any one axle could not exceed 10,400 pounds. Where one vehicle had more than two axles and one axle carried four wheels (two wheels at each end in tandem) the maximum permitted weight of this type of axle was 18,000 pounds. No vehicle could be operated on the highway with a gross weight in excess of more than five (5) per cent of its registered gross weight.

This law was in accord with sound engineering opinion as to the proper way to protect highways from super-heavy traffic. See testimony of Thomas H. MacDonald, Chief of United States Bureau of Public Roads in hearing before Interstate Commerce Commission, on December 5, 1930, in Cause No. 23,400, styled Co-ordination of Motor Transportation. (R., 187.) He stated in part:

"We would not build roads much less than 7 inches at the edge and 6 inches in the center, no matter what kind of loads we were going to carry. If we built thinner surfaces, they would curl up like tissue paper in the rays of the sun. They would warp; the frost heave would destroy them. So, we have a certain minimum thickness of road that it is necessary to build if there were nothing heavier than the ordinary passenger cars and farm trucks to use the road, and the whole question of the heavier buses and heavier trucks therefore begins with a certain minimum thickness of road which is necessary regardless of whether they exist or not.

* * * * * * *

"The critical factor in determining highway protection is the concentrated wheel load, and that is modified by the way it is distributed to the road surface. Concrete highways can be fatigued or worn out if there are a sufficient number of applications of maximum load applied continuously, perhaps, but in the tests that have been made up to 50,000 continuous applications of loads which stressed the concrete, for example, to 50% of its elastic limit, have not fatigued the material. The material will not fatigue within any practical basis of the application of these heavier loads. The roads are more destroyed really by climatic and soil conditions than they are by any use that is made of them by the public." (R., 187-188.)

The former Texas law was in line with the conservative restrictions of all the United States (R., 243). It was adopted July 3, 1929.

What caused the change? What new conditions arose to justify the hybrid Act under review? What object did the Legislature of Texas have in mind when this radical law was adopted.

Walter Beck, member of the House of Representatives of the State of Texas, member of the Committee on Highways and Motor Traffic, before whom the measure was considered, said:

> I think the Legislature fully intended to bring about an economic effect in transportation; I don't think they have made any mistake in what they were trying to do; I think they were trying to produce an economic effect in transportation and not an economical effect in highway cost; that is the sole effect of this legislation; it is the only law I ever saw passed that would require a public utility, if such it is, to abandon efficiency and be forced by operating practice to raise its costs to the user; I refer to the common carrier truck lines who are operating."

Certainly the Legislature did not take counsel of the official recommendations of the State Highway Commission of Texas which suggested some necessary changes, **but no such change as a provision for 7,000-pound net load regardless of length of vehicle, axle structure, or tire construction.** (R., 373-376.)

It did not heed the suggestions for change made by former Governor Moody in his message to the Legislature. His recommendation was "further limitation upon the **size and weight of busses and trucks.**" (R. 364). He did not suggest a regulation of the **net load** of trucks and unrestricted load for busses; removal of all regulations as to height of vehicles serving railroads and making such vehicles a **preferred class.** His plea was for a scientific highway regulation measure; not for a hybrid transportation scheme.

Whatever motive the Legislature had in passing this restriction—and good faith must doubtless be accorded its action—it passed a weight restriction having "neither rhyme nor reason" in theory or practical application.

That it has no relation to its ostensible object of protecting the highway from damage by super-heavy vehicles is apparent from a casual reading of the law. It fails to limit **gross load**—the thing of primary concern—and ignores the obvious fact that the amount of damage done to a highway by weight depends upon how the weight is concentrated on the highway—through proper axle, wheel, and tire distribu-

tion, as five hundred pounds resting on a small iron wheel will do more damage to a highway than ten times such weight on a low pressure balloon tire of sufficient width to distribute the weight. As said by Thomas H. McDonald: "Wheel load is the important thing." (R. 188).

Any disinterested engineer with knowledge of the relevant facts, we believe, will corroborate the testimony of A. R. Losh (R., 190) Special Engineer for the United States Bureau of Public Roads and formerly State Highway Engineer of Oklahoma, when he says:

> "The subject of damage to highway surface from motor vehicles is dependent upon so many factors that an arbitrary selection of a limiting net load would appear to be without justification from the standpoint of protecting the highway or the travelling public."

To like effect is the statement of J. M. Isbell (R., 193) who has for twenty-eight years been engaged as an engineer in the construction and maintenance of public highways in the State of Texas and other States:

> "That the net load of a vehicle has no relation to the damage which is or is not done to the highway by reason of its use upon the highway, as such damage is determined by the gross weight of the vehicle and the manner and way in which said weight is distributed onto the surface of the highway by a proper proportion of weight to tire spread."

Mr. L. B. Ryon, Professor of Civil Engineering at Rice Institute, long experienced in railway and highway construction and maintenance, says:

> "'The main safety factors when dealing with the question of damages which may be done by a vehicle to a highway is very largely, the gross wheel load applied to the highway. The net load is generally considered by engineers to have no effect on the safety of the highway; in my opinion, the preservation of the

highways depends solely on the gross load; so far as preservation depends on load, it depends on the gross load and not on the net load to which the highway is subjected.

"The distribution of the load being fixed, it makes no difference what the net load is, so far as the force that is applied to the pavement at any point, not beyond the strength of the pavement." (R., 196.)

R. J. Windrow, graduate engineer of wide experience, formerly State Highway Engineer of Texas, consulting engineer for the Highway Department of the State of Missouri, says:

"If I have before me consideration of the problem of protecting the highway by reason of weight placed on the highway, net load is no factor that enters into the reasonable consideration, net or live load hasn't anything to do with it other than making up the part of the total of gross load. It is not necessary to know the live load in order to design a road.

"Based on my experience as a highway engineer in Texas and my knowledge and familiarity with the highways and bridges of this State, a restriction of vehicles to net load of 7,000 pounds, taking into no consideration the question of wheel load, not taking into consideration whether I had rubber tires or iron tires, not taking into consideration the distribution of the load onto the pavement, I would say that it had no direct connection with the question as to whether it was a safe load to carry over these roads or not because you could not arrive at the answer just from that information." (R., 209.)

J. F. Rightmire, experienced engineer, consultant for Highway Departments of Louisiana, Arkansas and Oklahoma, says:

"I don't think I could construct a highway which would be adequate for the traffic it was going to carry if I were given the net weight of the vehicles that were to travel a highway; I would want to know what the maximum wheel load would be that the pavement would

be called on to carry. Another thing to be taken into consideration in determining highway damage is the speed at which the vehicle is going to be operated. Another element is the element of impact, which is dependent more or less upon the speed of the vehicle and on the kind of tires your vehicle is equipped with and the smoothness of the riding surface of the pavement.

"Assuming our highway system throughout Texas is built and designed to withstand ordinary weather conditions which prevail in this section and also to carry passenger busses whose weights range from seven to twenty-two thousand pounds empty, such highways are adequate to carry commercial trucks transporting loads in excess of 7,000 pounds." (R., 228.)

It would be mere repetition to cite additional engineering authority to substantiate such an apparently obvious proposition. (But see R., 176, 186, 216, 221, 226.) Scientific knowledge confirms this fact which common sense discerns.

It is realized that Appellees secured some engineering testimony from R. A. Thompson, Chief Engineer of the Wichita Falls & Southern Railroad, requested by the general attorney of the Missouri, Kansas & Texas Ry. Co. to appear as a witness (R., 316); and from George A. Knapp, special engineer for the Southern Pacific, employed by the Railroads to report upon highway conditions (R., 280); and from R. C. Waggener, formerly engineer for the Texas & Pacific Railroad (R., 323) and now employed by the Interior Compresses (R., 332), whose interests in this legislation are identical with that of the railroads, opinion testimony to the effect that this "net load restriction was a reasonable highway regulation." We believe that an analysis of their evidence **and particularly that given on cross-examination** will convince the court that their testimony in this case was not that type of "impartial expert testimony" which renders to the court any assistance in the solution of this problem. (R., 280-285; (R., 310-318.) The inferences drawn by Mr. Knapp are not justified as the

court will see if the Bates Experimental Test is fully considered. It is reported, Vol. 87, American Society of Civil Engineers (1924). **Weight is a negligible factor until it exceeds 50 per cent of the static load that the road will carry.** (See particularly McDonald statement, R., 188.) (R., 282.) The true problem was detailed by Mr. Ryon in his cross-examination by the Court. (R., 205.) A frank admission by J. M. Howe, Appellee's engineer, was to the effect that "the limitation was unreasonable on Federal aid highways" (R., 322) that on the second-class roads, in dry weather, the lighter and faster vehicles did more damage; and in wet weather, damage from rutting, depended largely upon the proportion of gross weight to tire spread (R., 322).

The expert testimony relied upon by Appellees consists of mere conclusions based upon personal opinion, not supported by any reason or substantiated by any facts. It would appear from a sound analysis of all the expert testimony that the net load restriction is a purely arbitrary selection not substantially related to the avowed object of this law.

Moreover, the effect of the law is to drive the heavier traffic (14,000 pounds) permitted under Section 7, to the lower type of road, as the intercity traffic, which largely passes over the cardinal Federal highways, will be limited to 7,000 pounds (R., 171).

Why should the fact that there are old bridges in Texas, not capable of carrying a gross load of more than 7,000 pounds, justify the weight restriction of this Act? Under Article 834 of the Penal Code, the Highway Commission has authority to regulate and restrict the traffic over such structures (R., 374).

It is recognized by counsel for Appellants that uniformly applied dimension restrictions on motor vehicles should be adopted; and that gross load should be limited within reasonable bounds and provisions made for its proper dis-

tribution onto the highway surface. **We do not challenge the right of the Legislature to pass such laws.** We do submit, however, that a net load weight restriction of seven thousand pounds is an arbitrary standard which has no reasonable relation to highway protection; and when it appears, as in this case, that hundreds of millions of dollars will be lost to those engaged in lawful enterprises (R., 126), that the channels of interstate motor transportation will be damned (R., 248), that the cost of transportation will be needlessly increased (R., 220), this Court should declare such restriction repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States. State of Minnesota v. Barber, 136 U. S. 313; Real Silk Hosiery v. Portland, 268 U. S. 325.

Whatever may be the recited purposes of the law, however plausible the arguments of its beneficiaries, this Court will tear aside the mask and subterfuge of "highway regulation," reveal the real purpose and object of such a restriction, enjoin its enforcement, and destroy its potentiality for wrong. Smith v. R'y Co., 181 U. S. 248; Meyer v. Nebraska, 262 U. S. 390; Frost v. R. R. Com. Co., 271 U. S. 583; Liggett Co. v. Baldridge, 278 U. S. 104, 73 L. Ed. 204. In this latter case, Justice Roberts, speaking for the Supreme Court, said:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

The net load restriction imposed by this Act is unnecessary in the interest of protecting the public. It can have but one purpose and one result: **to drive from the highways motor transportation wherever there is railroad competition.** The trial Court found this to be one of the effects of the law. Such laws should not be allowed to block the economic progress of transportation methods; and this Court has expressly held that under the guise of the State's po-

lice power the business of appellants, particularly those who are not common carriers, can not be subjected to destructive regulation. The language used by this Court in the case of Frost v. Railroad Commission, supra, is directly in point:

> "It is very clear that the Act is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." (70 L. Ed. 1102.)

When we consider the privileges extended under Section 7 of this Act—a 14,000-pound net load and a 55-foot vehicle—to those who haul to and from the common carrier receiving points (in fact, the railroads) it becomes clear that this is a railroad protective bill passed under the guise of a highway law.

This conclusion is not an assertion of counsel based upon any legal fight which has been waged by railroad attorneys to uphold the Act. (R. 280) Such is their privilege. The statement is a fair conclusion from the text of the law, the testimony of the expert witnesses who sought to justify its glaring discriminations, and, more important yet, the minority report of the Conference Committee of House and Senate of the Texas Legislature which passed the Bill (House Journal, Forty-Second Legislature, Regular Session, May 14, 1931, p. 2246):

> **"This bill purports to be a measure designed for the protection of the highways, but as recommended by the majority of this committee it is a measure designed to protect rail carriers from competition of the traffic upon the highways. The bill is clearly designed to allow the operation of busses as now conducted by the railroads, but will have the effect of eliminating trucks as a factor of competition with rail carriers.**

"The effort to eliminate the trucks without disturbing the busses results in a piece of legislation that is somewhat grotesque and clearly departs from any logical argument that protection of the highways is afforded or intended.

"We of the minority cannot approve a measure designed for the protection of one industry that requires virtual confiscation of millons of dollars of equipment already purchased, while at the same time resulting in no public benefit, but on the other hand certain to result in a definite increase in the transportation cost of this State."

The logic and force of the minority report is apparent from a careful analysis of the record upon which this appeal is based. It explains the seeming inconsistencies of what purports to be a measure protecting the highways, but which in truth and in fact is a regulation of those who use the highways.

We desire to make it clear that we have no fight to make upon the railroads, which are the mainstay of our country, but we feel that in securing the adoption of this legislation they misconceive their own best interest and deal a death blow, if this type of law is upheld, to the progress of transportation. In all events, this Court has the right and duty, by the strongest precedents, to set aside an arbitrary restriction which serves no good purpose as a highway measure except to handicap those in whose business truck transportation is an essential factor. Burns Baking Co. v. Bryan, 264 U. S. 512, 68 L. Ed. 813; Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385; Adams v. Tanner, 244 U. S. 592, 61 L. Ed. 1342; Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. Ed. 893; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32.

A law, such as this, which uses the acknowledged conservative factor of safety for a highway load as distributed through the tires to the highway surface (600 pounds per inch of tire width) is unreasonable, upon its face, as a protective measure, when it is perfectly obvious that the ordi-

nary four-wheel truck, less than 30 feet in length, carrying the **minimum** width tires of six (6) inches in the rear and five (5) inches in the front (22 inches of tire spread) can safely carry a gross weight of 13,200 pounds. When this tire spread is doubled the safe gross load can be doubled without any additional danger to the highway. Yet under this arbitrary load limit of 7,000 pounds, the latter vehicle, though capable of carrying with equal safety 14,000 pounds, is denied the right to handle this load. **Everyone** will agree that a thirty-five-foot vehicle equipped with dual rear tires and single front tires, having a total tire spread of 44 inches, can safely carry a gross load of 22,400 properly distributed over two axles. This means a net load of about 12,000 pounds. On any highway built to sustain ordinary traffic and the wear and tear of the elements, there would be no danger to the road from overloading. (R., 197-205.) Yet the latter vehicle can not be economically and efficiently utilized because it must run half-loaded, making two trips where one would suffice, thus adding to congestion, increasing transportation cost, and actually damaging the second-grade highways as much as though carrying a full load—perhaps more if the driver goes a bit faster on account of carrying a smaller cargo. This is the proof contained in the record; and the truth thereof is obvious from a consideration of those things of which the Court may take judicial knowledge (R., 187, 203, 206).

It is submitted that the Trial Court's findings of fact (R. 126) do not make a single **specific** finding based upon any **substantial testimony** that would justify a conclusion that restriction of net load has any substantial relation to highway protection. If such a conclusion be justified at all it **must be from the vague assertions** of interested witnesses whose opinions on this matter, find no support in the treatises of engineers who write upon the subject, the experience of practical men who have studied the matter, or the understanding of ordinary folks who have simply considered the proposition.

If 600 pounds per inch of tire spread is a conservative safety factor for the protection of the highway from superweights, as this Bill prescribes, then certainly within the prescribed dimensions of the vehicle one should be permitted to carry a load which, plus the weight of the vehicle, falls within the factor of safety. To forbid this is an unreasonable restriction of private rights protected by the 14th Amendment.

The other facts which make this restriction of net load to 7,000 pounds an arbitrary and unreasonable regulation appear in the summary of the Argument. Considering the obvious purpose of the restriction and its practicable effect, **we submit that this Court should declare it to be repugnant to the Fourteenth Amendment to the Constitution of the United States, because it bears no substantial relation to the objects of the law.** Heiner v. Donnan, 76 L. Ed. 501; McLeaish v. T. Binford, et al., 52 Fed. (2nd Ed.) 151; 76 L. Ed. 267 (mem.).

POINT II.

Section 5 of said Act, restricting the weight of the load that may be transported by appellants to 7,000 pounds, is repugnant to the equal protection clause contained in the Fourteenth Amendment to the Constitution of the United States, because:

(a) Under Section 7 of the Act, the privilege of transporting greater loads is accorded to others who operate under substantially the same conditions as appellants; and

(b) Under said Act, no load limit is imposed on commercial busses operating under substantially the same conditions as appellants.

(a) Discussion of the First Division of the Point.

Sections 5 and 7 of the Act are set out in full in Appendix A to this Brief, but the parts complained of, respectively, are:

> "Sec. 5. No commercial vehicle, truck-tractor, trailer, or semi-trailer, shall be operated on the public highway outside of the limits of an incorporated city or town with a load exceeding seven thousand (7,000) pounds on any such vehicle or train or combination of vehicles.
>
> "Sec. 7. The limitations imposed by this Act as to **length of vehicle** or combination of vehicles and **weight of loads** and of **height of vehicle with load** shall **not apply** to vehicles when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, provided said vehicle does not pass a delivery or receiving point of a common carrier **equipped to transport** said load, or when used to transport property from the point of origin to the point of destination thereof when the destination of such property is less

distant from the point of origin thereof than the **nearest practicable** common carrier receiving or loading point **equipped to transport** such load; provided, however, that in no event except by special permit, as hereinabove specifically provided, shall the length of said vehicles exceed 55 feet or the weight of such load exceed 14,000 pounds; and provided further that the limitations imposed by this Act upon weight per inch of tire shall apply to all such vehicles and loads."

The laws of Texas and the rules and regulations of the Railroad Commission will not permit those Appellants who are common carriers to transport property "from point of origin to the nearest practicable common carrier receiving or loading point." (R. 173) They are required by such authority to transport it to consignee at destination. (R. 236) Therefore under this condition such Appellants could carry only 7,000 pounds per truck whereas those specially favored by the section could lawfully transport 14,000 pounds on each vehicle, carrying the same kind of commodities and using the same highway as used by the appellants. A "common carrier receiving" point is not a town or city served by a railroad or truck line. It is a receiving station of a common carrier.

The only provision of the general exception contained in Section 7 seemingly available to appellants is when their vehicles are "used to transport property from the point of origin to point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load."

But this provision is so uncertain and indefinite that it prescribes "no standard of conduct that it was possible to know." International Harvester Co. v. Kentucky, 234 U. S. 216, 221: Collins v. Kentucky, 234 U. S. 634, 638; United States v. Cohen Grocery Co., 255 U. S. 81; Weeds

Incorporated v. United States, 255 U. S. 109; Connally v. General Construction Co., 269 U. S. 385, 391.

When appellants' trucks start on their journey loaded with more than 7,000 pounds, each time they arrive at a railroad station (common carrier receiving point) the necessity immediately arises for a judicial determination of whether it is "the **nearest practicable** common carrier receiving point **equipped** to transport the load" or whether "the destination of such property is **less distant** from the point of origin thereof than the **nearest practicable** common carrier receiving or loading point **equipped** to transport such load."

This is a penal statute imposing heavy fines and severe terms of imprisonment upon any person who violates "any of the provisions of this Act." (Section 15)

Mr. Chief Justice Hughes, in Smith v. Cahoon, 283 U. S. 852, 75 L. Ed. 1264, in dealing with the uncertainty of the penal provisions of the Florida Act, said:

> "The Legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

"What standard of conduct possible to know" shall be employed to determine whether the point is the "nearest practicable common carrier receiving or loading point?" What factors shall be used to ascertain whether such point is "equipped to transport such load?" Who is to determine these questions? How can the operator of the truck when he begins his journey determine in advance whether he is en route to destination or imprisonment? Penal provisions should be expressed with such clarity and definiteness that a layman can tell in advance whether the contemplated act on his part is or is not in violation of the law. United States v. Cohen Grocery Co., supra; Weeds,

Incorporated v. United States, supra; Cline v. Frink Dairy Co., 274 U. S. 445, 454; Connally v. General Construction Co., supra; International Harvester Co. v. Kentucky, supra; Collins v. Kentucky, supra; American Seeding Machine Co. v. Kentucky, 236 U. S. 660.

Furthermore, what relation has this ingenious exception to highway conservation? Is it not rather the regulation of a business? It determines who may use the highway, not the manner of use.

In Frost v. Railroad Commission, 271 U. S. 583, 592, this Court said:

> "It is very clear that the Act as thus applied is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or convervation of the highways is not involved."

To the same effect is the case of Michigan vs. Duke, 266 U. S. 570, and Buck vs. Kuykendall, 267 U. S. 307.

Appellants' witness Walter Beck testified (R. 218) that the Act had no relation to the protection or conservation of highways, but was designed to effect an economic change in transportation methods, meaning that its purpose was to drive traffic from truck operators to the railroads. There is no other reasonable explanation in the record for the special privileges conferred by Section 7.

Besides the question of uncertainty we think Section 7 confers special privileges upon a class resulting in discriminations which render the Act in violation of the equal protection clause of the 14th amendment to the Constitution.

The favored class operates vehicles identical in construction with those of appellants' (and others similarly situated), hauls the same kind of commodities, uses the

same highways and is permitted to operate at least two vehicles coupled together in combination (possibly an unlimited number in combination), with a load on each vehicle of 14,000 pounds, a total of 28,000 pounds, whereas appellants under the same conditions and making an identical use of the highways are restricted to loads not in excess of 7,000 pounds "on any such vehicle or train or combination of vehicles." (Section 5)

Such rank discriminations cannot escape the reach and protection of the equal protection clause of the 14th amendment to the Constitution by calling them "classification."

In Smith vs. Cahoon, supra, this court had under consideration a Florida Act regulating motor carriers which granted an exception in favor of those "engaged exclusively in the transporting of agriculture, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the **point of production** to the assembling or **shipping point** en route to primary market." Mr. Chief Justice Hughes in rejecting the contention that such discrimination could be justified by calling it classification said:

> "The principle that the state has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this court, Central Lumber Co. vs. South Dakota, 226 U. S. 157, 161; Miller vs. Wilson, 236 U. S. 373, 382, 384; Bekins Van Lines vs. Riley, 280 U. S. 80, 82; Silver vs. Silver, 280 U. S. 117, 123; Carley & Hamilton vs. Snook, 281 U. S. 66, 73; but the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary."

We quote further from the same opinion:

> "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of

obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellants' constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' (citing authorities.)"

Under the special privileges conferred by this section upon those operating to and from railroad stations, in competition with appellants, every foot of Texas highway can be traversed by vehicles 55 feet in length carrying net loads of 14,000 pounds each, where such vehicles are en route to a common carrier receiving point or are returning from a common carrier unloading point or where the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load.

Appellant Sproles and other operators similarly situated operating as common carriers under certificates of convenience and necessity issued by the Railroad Commission of Texas are subject to the regulations of the Railroad Commission. (R. 133) Their operations are limited to a defined route under fixed schedules and tariffs approved by the Railroad Commission. They are charged with the duty under their certificates, and the rules and regulations of said commission require them, to furnish this service over their respective routes under penalties of forfeiture of the certificates. Therefore the benefits and privileges extended under Section 7 to others do not apply to them. They are required under the rules and regulations of the Railroad Commission to issue uniform bills of lading the same as used by railroads which obligate them to **transport the property from origin to destination.** Under such circumstances they are permitted to transport only 7,000 pounds, whereas private or contract carriers operating in competition with them and serving the railroads are permitted to transport 14,000 pounds per vehicle from origin to the nearest railway station.

In the case of Buck vs. Kuykendall, supra, in construing a motor carrier law of Washington, this court said:

> "Its primary purpose is not regulation with a view to safety or conservation of the highways, but the prohibition of competition. It determines not the manner of use but the person by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."

In Lossing vs. Hughes (Tex. Ct. of Civ. App.) 244 S. W. 556, 560, a statute imposing certain license fees upon motor vehicles, but excepting owners of motor trucks who operate them for agricultural purposes, was held unconstitutional. The court said:

> "Without indicating any reason for it, the Legislature by the provisions of this law imposes penalties and restrictions upon the property rights which inhere in the ownership and operation of commercial motor vehicles, and exempts motor vehicles used in agricultural pursuits, from such penalties and restrictions; and, equally without indicating any reason for it, makes criminal the use of certain motor vehicles for commercial purposes and, at the same time, makes lawful the use of the same vehicles for agricultural purposes upon the same roads. No reason suggests itself to us as a justification of such discriminations. In these respects, as well as in other respects apparent at a glance, the owner and users of commercial motor vehicles are made the victims of capricious discrimination."

In McLeaish vs. Binford, 52 Fed. 2d. 151 (affirmed by this court, 76 L. Ed. 267), the Court declared invalid a statute passed by the Texas Legislature (at the same session the Act now complained of was passed) which attempted to regulate the number of cotton bales that could be carried on a truck.

This is not an instance where a just and reasonable regulation incidentally works a hardship upon a few unfortunately situated, but this law, if permitted to stand, will confiscate motor vehicles of the value of $150,000,000 (R. 152) without giving the owners thereof their day in court or compensation for such losses. The court finds that:

> "Due to the size and weight of such combinations and cost of their operation, he (Appellant Sproles) cannot limit the load to the 7,000 pounds prescribed by the Act and operate without a loss; and we further find that under the weight restrictions of House Bill 336 complainant cannot operate the aforesaid combinations without a loss; that complainant prior to and at the time of passage of House Bill 336 had unexpired contracts with shippers predicated upon the former load weight limit permitted by law, and had equipment especially designed to carry out such contracts on which equipment complainant will sustain a loss, but not a total loss. Complainant will also sustain a loss on the said contracts." (R. 127)

Appellant Sproles has invested in his business more than $264,000.00 (R. 127, 150); he has certificates of public convenience and necessity issued by the Railroad Commission of the State of Texas in excess of the value of $25,000, franchises constituting valuable property rights; "he has acquired and is the owner of a profitable business which will be virtually destroyed and the equipment rendered useless and the certificates of public convenience and necessity rendered practically valueless by reason of the application to his said business of the restrictions as to length and weight contained in House Bill 336, in that said restrictions if enforced against complainant will result in complainant being virtually put out of the transportation business, as under said restrictions a profitable transportation business cannot be conducted by complainant." (Testimony of J. T. Cox, R. 174)

The Act on its face appears to be one regulating all truck traffic with equal application, yet it is so skilfully drawn as to eliminate principally the traffic operating in competition with railroads. The operations of Appellants are as effectively and as certainly removed from the highways as if they had been singled out and named in the Act. They operate the larger type of equipment, the operating cost of which precludes its use when permitted to haul only 7,000 pounds. This is the effect of the finding of the Trial Court. Their investments totaling more than $671,000 are virtually confiscated.

That this result will follow the enforcement of the law was recognized by the Trial Court in the issuance of an injunction restraining enforcement pending appeal to this Court. (Original Record 708)

How do Appellees seek to justify the purported classification whereby one group of operators is restricted to a seven-thousand-pound cargo and another group of operators is permitted a fourteen-thousand-pound cargo?

Analysis of the Trial Court's Findings.

The only finding of fact made by the Court as a justification for extending special privileges under Section 7 is embraced in paragraph XXXI (R., 138), which reads as follows:

> "We find that the average distance traveled by trucks carrying property from points of origin to common carrier receiving points or from common carrier unloading points to destination is from four to eight miles; **that these hauls are universally short**; that such operations are confined to small areas and greatly **reduces the danger of traffic congestion or highway injury** incident to truck transportation; and the Court finds that those transporting under the exception permitted by Section 5(b) of the Act do so under **distinctly different circumstances and conditions** from complainant and intervenors who transport over fixed

routes, and from other persons using the highways, and that these differences justify the classification which is made by the Legislature; we further find that this exception will have the effect of **diverting from the highways** generally a great deal of traffic which will have the effect of **reducing highway congestion and danger**, and that for this additional reason such classification is just, fair, and reasonable."

When we analyze this finding we see that the Court gives **five reasons** for justifying a classification between those who haul under the provisions of Section 7 and all other operators. These reasons are:

1. Operators using the highways under the conditions named in Section 7 transport their loads on an average of from four to eight miles.
2. Such operators cause less traffic congestion and highway injury.
3. Such operators transport under distinctly different circumstances and conditions from all other persons.
4. This exception will have the effect of diverting traffic from the highways.
5. This exception will reduce highway congestion and danger.

It is clear that reasons Nos. 2, 4 and 5 are not differences justifying a classification; they are merely results which attend upon the general restriction of Section 3. It is perfectly obvious that any results which attend the enforcement of an act, wherein classifications are attempted, can not be looked to for the purpose of determining whether or not there were differences of such a nature as to warrant the attempted classification. **When classifications are made there must exist as between the two classes differences which have some substantial relation to the object of the law.** For example, if all lawyers are forbidden the use of the highways, it naturally follows that there is less use of the highways and consequently less highway con-

gestion. The result which would naturally follow such a restriction can not be used as a justification for excluding lawyers from the highways and permitting doctors to make use of them. Expressing the argument in somewhat different language it is this: **Distinctions which justify classifications must exist when the classification is made; and such distinctions must be reasonably related to the objects of the law.** Results attendant upon the enforcement of a statute are not differences justifying classifications. Therefore, reasons 2, 4 and 5, above-mentioned, need not be considered as differences justifying classification because such are merely results probably arising from the enforcement of the statute.

The argument, therefore, narrows itself to the consideration of the two questions represented by reasons 1 and 3 given by the Trial Court, to wit:

1. Operators using the highways under the conditions named in Section 7 transport their loads on an average of four to eight miles.

3. Such operators transport under distinctly different circumstances and conditions from all other persons.

The Court will note that the second matter for consideration is a mere conclusion of the Court and is the very point in issue. In determining whether or not there are **distinctly different circumstances and conditions**, we can not prove such by a mere finding that there are such. The question is:—what are the differences? We are therefore left with only reason No. 1 as a difference justifying this classification; and we submit that (a) such difference does not exist between the classes **as a whole**, and (b) if there be such difference, it has no reasonable relation to the object of a weight restriction.

With reference to whether or not the operators under Section 7 transport under **distinctly different circumstances**

and conditions from all other persons, we respectfully invite an examination of the record, as the Court's conclusion is unwarranted, in our opinion, by the testimony.

1. Appellants' witness, W. O. Beeman, stated in substance that the highways would be damaged as much by those who carried 14,000 pounds to and from common carrier receiving points as by any other class of operators (R., 164).

Appellants' witness, J. M. Isbell (R., 195), said:

> "That a vehicle fifty-five feet in length driving to or coming from a common carrier receiving point, carrying a 14,000-pound load, all other conditions being the same, is just as injurious, and more so, to the public highway and the traveling public as a vehicle 35 feet long carrying a 7,000-pound load in competition with railroads." (See additional testimony R., 194.)

Appellants' witness, L. R. Stringer (R., 186), said:

> "That from his knowledge and experience that a truck carrying a 14,000-pound load to a common carrier receiving point does just as much damage to the highway and imperils the public just as much as a truck carrying a like weight paralleling a railroad; as a matter of fact there is no basis for fixing one weight for those trucks carrying to a railroad and another weight for those carrying in competition to a railroad, so far as protection of the highway and the traveling public is concerned." (R., 186.)

The foregoing statements comport with common sense and reason and are facts within the knowledge of every ordinary man.

2. Appellees' witness, E. C. Kincade, stated in substance that the basis for the privilege of authorizing greater loads to and from common carrier receiving points was that there is a certain class of commodities such as boilers and large machinery that of necessity has to be

moved to and from said points, but the infrequency of this traffic does not justify the maintenance of a service for that alone and therefore such operators should be permitted to carry loads not to exceed 14,000 pounds, under the exception of section 7, in order to financially justify them to keep on hand equipment which could be used in transporting loads of commodities which could not be reasonably dismantled and weighing more than 7,000 pounds. (R., 381, 382, 383.) This is a result desired by the law; not a difference justifying a weight classification. It would be just as reasonable to leave the intercity carriers unmolested and restrict the railroad motor carriers. You would still have available vehicles for the articles that could not be dismantled.

Appellees' witness, R. G. Wagner, stated in substance that there was a difference between those who carried under the provisions of Section 7 and those who were generally restricted to 7,000 pounds in that those who carried under the privileges of Section 7 transported their loads an average of only about 4.35 miles, whereas, **Class A common carriers** generally moved their commodities over a greater distance on the highways. (R., 328, 329, 330.) This is not a difference which has any reasonable relation to the object of a weight restriction; **and, moreover, the discrimination is not against Class A motor carriers alone.** It equally affects Tennessee Dairies, Inc., John Barbour Trucking Company, and thousands similarly situated who haul under substantially the same conditions as those who carry to and from common carrier receiving points. A truck carrying 14,000 pounds damages any point or place on the highway just as much, whether it be going a distance of fifty miles or one mile. It is the concentrated weight on any **one point that injures.** Fatigue of the highway is unimportant for all practicable purposes, within reasonable limits, which **experiment** has proved to be 50 per cent of the strength of the highway when measured by a static load. (R., 187.)

Appellees' witness, E. T. Murphy, states in substance that a net cargo restriction of 7,000 pounds will take a substantial amount of traffic from the highways, thus diverting it to other forms of transportation. (R., 387) He further states that under the provisions of Section 7 there is a less frequent use of the highways. (R., 387.) This is a result of the statute; not a difference which justifies a weight classification.

The foregoing testimony is all that the record discloses to sustain the Court's finding (which is, in fact, a conclusion) that those transporting under the exceptions permitted by Section 7 of the Act do so under "**distinctly different circumstances and conditions**". (R. 138) What are the differences which have any relation to the object of a weight restriction? What are the "substantially different conditions" referred to by the Court? **They vanish when the problem is considered and the testimony analyzed.**

We submit that the foregoing testimony, upon which the Court must have based its finding, does not justify a classification as between those who transport to common carrier receiving points and those not engaged exclusively in that type of transportation. Every foot of Texas highway will be traversed by carriers having 14,000-pound cargoes under Section 7. The differences in this type of transportation from the type of transportation restricted to 7,000 pounds are differences only, without any substantial relation to the object of a weight law. Certainly diversion of traffic, as the result of a law, does not make a difference justifying the passage of a law. Moreover, there is no evidence to show that in truth and in fact traffic congestion will be eliminated by such provision, but an equally possible result is that traffic may be increased by requiring more trips to accomplish the same purpose.

It is submitted that the evidence discloses no differences which warrant this attempted classification.

(b) Discussion of the Second Division of the Point.

This division deals primarily with the discrimination contained in Section 5 of the Act.

The following definitions are found in the statute (Sec. 1):

> "'Vehicle.' Every mechanical device in, upon which or by which any **person** or **property** is or may be transported or drawn upon a public highway, including motor vehicles, commercial motor vehicles, truck-tractors, trailers, and semi-trailers, severally, as hereinafter defined, but excepting devices moved by human power or used exclusively upon stationary rails or tracks."
>
> "'Motor Vehicle.' Every vehicle, as herein defined, which is self-propelled."
>
> "'Commercial Motor Vehicle.' Any motor vehicle other than a motor cycle, designed or used for the transportation of **property**, including every vehicle used for delivery purposes."

The Act complained of is a general law ostensibly to conserve the highways and protect the safety of the traveling public. It purports to regulate the dimensions of **all** motor vehicles and combinations thereof. It limits the load that may be transported on all such vehicles **except busses.** These limitations are imposed under penalties of fine and imprisonment.

Section 5 limits to 7,000 pounds the load that may be transported on "commercial motor vehicles." The term "commercial motor vehicle" as defined by the Act **does not include passenger busses, for which no load limit is fixed by this or any other law.** This section results in discrimination against operators of commercial motor vehicles (trucks) in favor of operators of busses because the load limit as prescribed by said section applies to trucks but does not apply to busses.

It is our contention that the special privilege granted in favor of the operation of busses does not in a true sense constitute a separate classification, but is simply a special

favor granted to one member of the group sought to be regulated.

Stripped of its legal verbiage, the Act, in so many words, says that **no** motor vehicle may be operated upon the highways of this state which exceeds:

(a) 35 feet in length for single vehicles and 45 feet for combination of vehicles;

(b) 96 inches in width;

(c) 12½ feet in height.

But as to the restriction of the load to be carried the Act says that **trucks** cannot carry load in excess of 7,000 pounds, but that **busses** may transport load without limitation as to weight. No limit is placed on the weight of such vehicle or the load to be carried thereon.

The vice in this part of the law consists not in a discrimination between **classes** but in a discrimination between persons operating instruments of transportation occupying the same class, making like use of the highways.

Viewing the Act as a whole we do not believe it can be said that a separate class has been created for the regulation of busses as such. Rather it appears from the text of the Act that special privilege has been granted to a favored member of the general class.

In the case of Louis vs. Boynton, 53 Fed. (2d) 471, the court had under consideration an Act of the Kansas Legislature, similar to the one in question, containing an exception declaring that the provisions thereof should not apply to the "delivery of farm products to or from markets by the producer on any of the roads or highways in the state." It was alleged that this exception rendered the Act invalid under the equal protection clause of the 14th amendment. The court in sustaining this contention said, on page 475:

"The exemptions of the movement of farm products by the producer thereof presents a more serious question, as heretofore stated.

"The general provisions of the act, which are designed to promote the public safety cover every conceivable use of the public highways by motor vehicles, except private passenger vehicles, whether those vehicles are used by carriers for hire, contract carriers, private carriers, or by persons who casually, or incidentally, or occasionally use the highways. Within this general provision we find one class, the farmer or the producer of farm products, by virtue of the last exemption in Section 1, placed in a favored position. We are of the opinion that there is no rational basis for this classification bearing reasonable and just relation to the objects of this legislation.

"It appears to us that the producer of farm products carrying his products to market by motor vehicle over the roads and highways of Kansas, will make just as much use of the highways as a great many of the persons who are not exempt, and who fall within the broad provisions of Section 1, and who make only an occasional or incidental use of the highways, as does the farmer.

"We conclude that the exemption with respect to the movement of farm products by the producer thereof violates the equal protection clause of the Federal Constitution and renders the act unconstitutional."

A classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect of which the classification is proposed and can never be arbitrary without any such basis. G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S. 150, 41 L. Ed. 666; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32.

In the case of Quaker City Cab Co. vs. Commonwealth, 277 U. S. 399, 72 L. Ed. 929, this court held that the imposition of a tax on the gross receipts of **corporations** operating taxicabs not imposed upon **individuals** and **partnerships** engaged in the same business, unconstitution-

ally deprives corporations of the equal protection of the laws, where other taxes are laid upon both classes of taxpayers alike.

In the case of People vs. Kewanee, 104 N. E. 680, the Supreme Court of Illinois had under consideration a city ordinance forbidding the right to lay gas pipes along or under the city streets except on petition of the owners of the abutting property. The act was declared to be unconstitutional. The court on page 683 said:

> "The act was intended to confer private rights upon the owners of abutting property which they might protect by judicial proceedings.
>
> "This being the purpose of the act, no reason is seen for the discrimination made against persons desiring to lay gas pipes in the street, and in favor of those desiring to lay water pipes. The effect of the laying and use of the pipe is exactly the same in each case. The pipe is the same, the manner of laying the same, the same kind of excavation must be made, and after the work is completed the condition of the street will be the case whether gas pipes or water pipes have been laid. No reasonable basis exists for a difference in legislation in regard to pipes used in transporting gas from that in regard to pipes used in transporting water.
>
> "The result of the act is to confer upon persons or corporations using water pipes in the street special rights and privileges not enjoyed by persons or corporations using exactly the same kind of pipes for gas. It confers upon abutting lot owners the special privilege of preventing the laying of the identical pipes in the same way as to be used for gas."

On this question we quote from Connolly vs. Union Sewer Pipe Co., 184 U. S. 540:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, cor-

porations and associations in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * *. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.

* * * * * * * * * *

"In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

Keeping in mind the purpose of the law (protection of the highways) there does not appear to be the slightest justification for making a distinction in the load limit to be carried upon busses and the load to be transported on trucks. It is perfectly obvious that a bus carrying 15,000 pounds of human cargo, running at the permitted rate of 40 miles per hour, will do more damage to the highway than a truck of identical construction carrying 7,000 pounds of ordinary freight, traveling at the permitted rate of 25 miles per hour.

Busses operate over practically every highway in the state and their use of the highways per vehicle is more frequent than the use by trucks inasmuch as they maintain more frequent schedules. The average weight of such vehicles empty is from 10,500 to 26,000 pounds (R. 219), much in excess of the weight of the average truck. These busses carry as many as 100 passengers, constituting a net load of approximately 15,000 pounds (R. 238) (Appellants' exhibit No. 19 sent up in the original form).

A comparison of the uses of the highways by trucks and busses may be had by reference to testimony of J. T. Cox (R. 234) in which it is established without dispute that the Southland Greyhound busses operating between Houston, Texas, and Dallas, Texas, the same route over which the Appellant Sproles operates, travel in one month 76,000 miles as compared to about 45,000 miles traveled by the trucks of the Appellant Sproles. This comparison of the use of the highways by the respective vehicles is typical of the operation throughout the state. (R. 236)

The printed bus schedule and map (Appellants' exhibits Nos. 21 and 20 sent up in the original form) show the extent and frequency of the use of the highways in Texas by busses. Common carrier busses carry approximately 4,750,000 people per year over Texas highways, according to the testimony of Mark Marshall, Appellees' witness,. (R. 370) They operate over practically every highway in the State. The use of the highway by busses is more fre-

quent than the use by trucks inasmuch as they are operated on more frequent schedules.

There is no difference in the way in which busses and trucks use the highways. Practically the same character of vehicles are used for the respective operations. Appellants' Exhibit No. 19 sent up in the original form, is a photograph of a truck and semi-trailer combination used in the transportation of persons, with a carrying capacity in excess of 100 people. This vehicle is identical with those used by Appellant Sproles for the transportation of freight. The design, construction and equipment are the same.

> "Outside of some few differences as to body, I would say that kind of equipment is what we generally use to transport freight but that one is shown to be loaded with human cargo instead of freight; that kind of equipment could be used to transport freight in the service that we would employ it." (Testimony of J. T. Cox) (R. 238.)

The aforesaid vehicle may be used to transport a load of persons **with no limit as to total weight** without violating the penal provisions of the Act, but if the same vehicle is used to transport a load of freight in excess of 7,000 pounds the operator thereupon becomes subject to prosecution and infliction of heavy penalties.

Appellees contend that since busses operating over the highways of Texas are under the supervision and control of the Railroad Commission, it was proper to exclude them from the weight limitation in Section 5. To sustain this contention the case of Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596, is cited and relied upon by them.

That was a suit to enjoin the enforcement of a statute of New York alleged to be in contravention of the equal protection and due process clauses of the Fourteenth Amendment. We quote from the opinion, page 141:

> "The statute requires every person, etc., engaged in the business of carrying passengers for hire in any

motor vehicle, except such cars and motor vehicles subject to the Public Service Commission law, upon any public street in a city of the first class, to file with the Tax Commission either a personal bond with sureties * * * conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation or the defective construction of any motor vehicle."

This statute was attacked as being discriminatory because of exception in favor of street cars and omnibusses operated upon the streets in a city of the first class. The Court in rejecting this contention said:

"Neither is there substance in the complaint that street cars and omnibusses are not included in the requirements of the statute. The reason **appearing in the statute itself**, for excluding them is that they are regulated by the Public Service Commission laws."

The reasonableness of this exception appeared upon the face of the Act. The vehicles excluded from the statutes were under the regulation of the Public Service Commission, which no doubt had authority to require bond to protect the public interest. **The evident purpose of the Act was to require such protection from that class of operators not already under the Public Service Commission.** The case is no authority for the attempted classification in this Act, as trucks in Texas are under the same regulatory authority as busses, and are even more strictly supervised.

It has been asserted that **all** busses operating in Texas are under regulation of the Railroad Commission. However, a reference to Article 911-A, of the Revised Civil Statutes of Texas will disclose that **only such busses as operate for hire between incorporated cities are subject to such control** and there is nothing in the motor bus law or any other statute of Texas authorizing the Railroad Commission or any one else to fix or limit the load carried on

such vehicles. Such is not the case with trucks operated for hire (outside the limits by incorporated cities).

Section 12a of H. B. 335 (Act giving Railroad Commission jurisdiction over trucks operating for hire) provides:

> "The Commission is vested with the power and authority and it is hereby made its duty to approve or disapprove the nature and character of equipment to be used under said permit or certificate and the **amount and character of tonnage** which may be hauled therein on any motor vehicle, trailer or semi-trailer used under such permit or certificate; * * * provided, however, said Commission shall not authorize the use of any equipment of greater dimensions than otherwise permitted by law, nor any tonnage of greater weight than otherwise permitted by law."

So it will be seen that no point is gained by the contention of appellees that busses are under the supervision of the Railroad Commission, since trucks are likewise subjected to the same authority and in addition the Railroad Commission, not only has the right but it is made its duty to approve or disapprove the nature and character of truck equipment and the kind and character of tonnage to be hauled thereon. **But the Commission has no such authority with reference to busses.** The distinction made in Packard v. Banton, supra, **does not, therefore, exist in the case at bar.**

How do Appellees seek to justify the purported classification between trucks and buses?

Analysis of the Trial Court's Findings

In the Court's finding No. XXII (R., 135) there are made certain findings of fact to justify a different regulation in speed. We make no complaint of discrimination on this score. The only finding of the Court (No. XXII, R., 135) which seeks to justify a classification between buses and trucks is as follows:

"We find that in 1930 there were only 900 passenger buses operating over the highways of Texas, **representing less than .004 of 1% of the total number** of vehicles on the highways of this state; that such passenger buses, while similar in many respects in construction to trucks carrying freight, **are specially equipped to haul passengers, operate under regulations of the Railroad Commission** and **under conditions wholly different from that of trucks**; that the **difference between these two types** of vehicles, and the number of each type, and in their operation is ample justification for legislative classification, and is reasonably related to the objects sought to be accomplished by this law; that since there is **a great difference between the conditions under which the two types of vehicles are operated**, that the Legislature may reasonably classify said vehicles and apply to motor trucks different regulations from those applicable to motor buses; and that therefore the provisions of this Act regulating the speed are just, fair, reasonable regulations based upon differences between the respective classes above referrd to; that since the operation of trucks is essentially different from the operation of buses, no unlawful discrimination is made against them because they are subject to different regulations with respect to net load, and we find that this difference between the two classes is reasonably related to the objects sought to be accomplished by this law."

When we analyze this finding we see that the Court gives **six reasons** for justifying a classification between buses and trucks. These reasons are:

1. Buses are a very small per cent of the total number of vehicles on the highways.

2. Buses are specially equipped to haul passengers.

3. Buses operate under regulations of the Railroad Commission.

4. Buses operate under conditions wholly different from that of trucks.

5. Buses are different in type from trucks.

6. Buses operate in an essentially different manner from trucks.

An examination of these six reasons reveals that we can discard reason No. 3, because trucks are likewise under the regulations of the Railroad Commission, which in fact is authorized to regulate the weight of trucks but not of buses, as heretofore pointed out. We can also eliminate reason No. 4, because such is the very issue which is being analyzed, to-wit: whether or not they do operate under such different conditions as to justify a classification. We can not support a classification by a conclusion which involves the very point in issue.

The argument, therefore, narrows itself to four reasons:

1. Buses are a very small per cent of the total number of vehicles on the highways.

2. Buses are specially equipped to haul passengers.

5. Buses are different in type from trucks.

6. Buses operate in an essentially different manner from trucks.

At the outset, we submit as a matter of law that none of these four reasons has any substantial relation to the object to be accomplished when a weight restriction is imposed. The fact that there are a less number of buses makes the discrimination more glaring and less justified; the fact that buses are equipped for passengers has no more relation to a weight restriction than the fact that they may carry siren horns; the fact that buses are different in type means nothing, as trucks also vary in type; the fact that buses operate in an essentially different manner from trucks is meaningless when a weight restriction is under consideration, unless this means that bus sched-

ules are more frequent and their speed is greater, both of which factors would more consistently require the application to buses of the weight restriction imposed on trucks.

However, we respectfully invite an examination of the record for the purpose of determining whether or not the Trial Court was correct in concluding that there were such differences between buses and trucks as to justify a classification under a weight law.

I. Appellants witness, Walter Beck, a member of the Legislature of the State of Texas, experienced in, and a student of, highway matters (R., 215), said:

> "No reason was ever stated to me why the proponents of these measures desired the restriction as to load limit applied to trucks and not applied to passenger buses." (R., 280)
>
> "Buses carrying passengers are operated on practically all of our state highway system." (R., 219)
> "In actual practice their schedules are more frequent than trucks because they operate faster." (R., 219)
>
> "I can not from my knowledge and experience of highways and vehicular traffic tell the Court any reason why there should be made a difference and a distinction between the weight carried on a truck and that carried on a bus." (R., 220)

Appellants' witness R. J. Windrow, graduate engineer and former State Highway Engineer of Texas, long experienced in highway problems involving both construction and maintenance, said:

> "When you consider the problem of highway damage from the standpoint of weight, I would say there would be no difference whether you were carrying people or whether you were carrying fish, it is just the load that is being considered; there would be no difference between that and any other commodity that I know of that would make any material differ-

ence between those two classes of vehicles if you were considering net load alone." (R., 211)

Appellants' witness L. B. Ryon, professor of civil engineering at Rice Institute, long experienced in highway maintenance and construction (R., 195), said:

> "Take a passenger bus carrying 15,000 pounds of persons, and a commercial vehicle or truck carrying 8,000 pounds of merchandise, if the weight of the two trucks were the same, there would be considerably more damage done to any highway by the 15,000 pounds of passengers, because the wheel load is heavier." (R., 207)
>
> "A passenger bus carrying 14,000 pounds of people, traveling at a speed of 45 miles per hour would do more damage from deterioration on the non-rigid type road or the impact in rigid types then a commercial truck carrying a 10,000 pound load of similar design and construction with respect to tires and the like as the passenger bus, going at a rate not to exceed 25 miles per hour, assuming that to be the net load and that the vehicles are the same in each instance.
>
> "When you consider the problem of highway damage from the standpoint of net weight, I would say there would be no difference whether you were carrying people or whether you were carrying fish, it is just the load that is being considered; there would be no difference between that and any other commodity that I know of that would make any material difference between those two classes of vehicles if you were considering net load alone." (R., 211)

The foregoing **uncontradicted testimony** is supported by the positive statements of Appellants' witnesses J. C. Carrington (R., 172), W. O. Beeman (R., 164, 180), John B. Barbour, C. F. Johnson (R., 176), J. M. Isbell (R., 194), E. L. Farmer (R., 232), J. T. Cox (R., 235, 238). (See also, Exhibit No. 19, Photograph of Passenger Bus, Original Exhibits; and, also, Transportation Schedule of Grey-

hound Bus Line, Exhibit No. 21, sent up as an Original Exhibit.)

Appellants' testimony supporting their contention that there is no difference between buses and trucks which will justify a classification is supported by the testimony of Appellees' own witnesses. For example, the testimony of the witness, George A. Knapp, Special Engineer of the Southern Pacific Railroad, engaged to collect data for the purpose of substantiating all purported classifications contained in this Act, is:—

> "Taking the macadam type of highway, with a passenger bus which has a weight when filled with passengers of approximately 25,000 pounds, moving at a speed of 45 miles per hour, and a commercial truck similarly equipped and built, weighing approximately 5,000 pounds, and with it its load of 7,000 pounds, or a total of 12,000 pounds, the relative effect of those two vehicles running over that identical stretch of highway so far as a damage to highway is concerned, would be **the greater weight and the greater speed** would do the **greater damage.**
>
> "The mere fact that a passenger bus has better brakes on it and could stop quicker, from the braking point of view, that would not have anything to do with protecting the highway from the weight standpoint." (R., 284)

2. Appellees' witness, Mark Marshall, did not point out any distinction, but on this general point said:—

> "Since June, 1927, when regulation of passenger-carrying vehicles was inaugurated, motor buses have carried approximately 4,750,000 people per year over the highways." (R., 370)

(This referred only to common carriers and did not take into consideration the enormous traffic of contract carriers, such as privately-owned buses like Sinclair Oil & Refining Company, supra.)

Appellees' witness, Dan Moody, former Governor of Texas, made no distinction between buses and trucks in his recommendations to the Legislature of Texas regarding weight regulation of vehicles. (R., 364) He said:—

> "Laws should be enacted placing further limitations upon the size and weight of the **buses and trucks** that may be legally operated upon the public highways of this State."

However, counsel calls the Court's attention to the fact that under this Act no restriction was placed on the net load of buses and no practical restriction on gross load, since they can carry any gross load **depending upon the tire spread of the vehicle,** which has only to be enlarged to justify **any gross weight the operator may desire.**

The only other witness of Appellees on this point was L. G. Phares, who, by affidavit, testified with respect to traffic problems concerning the operation of buses and trucks, and, on oral cross-examination, said:—

> "In my affidavit where the expression is used that House Bill 336 is a reasonable and practical measure, I don't think I said 'protection of the highways', as far as preservation of the road is concerned. Most of my affidavits dealt strictly with the safety measure out on the road and the traffic problem." (R., 342)

It is obvious that bridges must be as strong to support the weight of passenger buses or trucks of like weight; it is obvious that the smaller number of buses does not justify a weight regulation; it is also obvious that under this law the gross weight of buses would be practically twice that of trucks operating under Section 5. In attempting to justify a difference in regulation based upon a difference in number the Lower Court "failed to recognize the apparent paradox, present in every equality case,

that the legislature when it fails to include within the effective scope of a statute all the persons within a particular class, does less than it might but more than it may."

We submit that the finding of the Trial Court attempting to justify this classification is wholly unsupported by the testimony and that such an attempted classification is a discrimination within the rules of law heretofore discussed.

POINT III.

As to interstate operators, Section 5 of said Act is null and void, because a net load limit of seven thousand (7000) pounds is an undue burden upon interstate commerce, and such restriction has no fair and reasonable relation to the objects of the Act and is therefore repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, relating to the regulation of commerce among the several states.

The Yellow Cab Transit Company, a Corporation, by leave of Court filed its Intervention Petition herein on September 3, 1931. (R., 54) In addition to the allegations contained in the original Bill of Complaint filed by Ed Sproles, which allegations were adopted by said Intervener, it was specifically alleged that said Intervener "is engaged in the business of operating a commercial motor freight line in the states of Kansas, Oklahoma and Texas, in which it transports merchandise and freight of all kind and character from points in Oklahoma and Kansas to points in Texas, transporting interstate shipments only * * *." It was specifically alleged that the Legislative Act under review constituted a burden upon the movement of interstate commerce. (R., 56) Substantially the same allegations were made in the Intervention Petition of Southern Transportation Company, Inc. (R., 145) which Corporation was likewise engaged in interstate commerce. (Of Original Record, Page 147) The Record clearly shows the nature of this Intervener's business. (R., 189)

Russell H. Hohman stated that the equipment used by Yellow Cab Transit Company was of the latest and most up-to-date class used anywhere on the highway; that there was no sidesway to the semi or full-trailer and that each wheel was equipped with dual pneumatic tires of large enough carrying capacity to insure a cushioned protection on the highway at the ratio of 800 pounds per square inch of tire in contact with the highway. The witness,

F. A. Markland, stated that the equipment used by said Intervener was equipped with pneumatic tires; that it did not damage the highways; and that such equipment was recommended by the United States Bureau of Public Roads. (R., 189)

The Trial Court found that Intervener, Yellow Cab Transit Company, was engaged exclusively in interstate transportation and had an investment in vehicles, as defined by House Bill 336, having an approximate value of $61,000; that due to the size and weight of said vehicles and due to the cost of their operation, Intervener cannot limit its load to 7,000 pounds and operate without a loss; that the load limit in Oklahoma and Kansas permits a net cargo of 32,000 pounds upon vehicles used by said Intervener and that said Intervener cannot, under House Bill 336, operate in Texas with such a load. (R., 128) The Trial Court made similar findings with respect to Southern Transportation Company. (R., 129) Notwithstanding the above evidence and the specific findings of fact, the Court concluded that the length and weight restrictions of the Act did not unduly interfere with interstate commerce. (R., 140) This finding of fact and conclusion of law were attacked by Appellants in their Assignments of Error. (R., 144, R., 146)

If the length and weight restrictions, and particularly the weight restrictions, imposed by Sections 3 and 5 of this Act are upheld as valid regulations of those engaged in interstate transportation, a serious obstacle is placed upon the free flow of transportation between the several states. An operator, such as Intervener, Yellow Cab Transit Company, which transports commodities through the states of Kansas, Oklahoma and Texas must be prepared at the Texas line to keep and maintain different equipment from that used in Kansas and Oklahoma, or else change the equipment permitted in Kansas and Oklahoma to that which is permissible under the terms of this drastic Act.

If this Act be upheld and other states enact similar regulatory measures, there will be a chaotic condition in interstate movement of commodities, such as was never contemplated by those who wrote into the Constitution of the United States the provisions of Article 1, Section 8, Clause 3, thereof, relating to the regulation of commerce among the several states. We will necessarily revert to those conditions which existed under the old Articles of Confederation which existed prior to the adoption of the present Constitution of the United States.

Appellants are of the opinion that those subjects relating to interstate commerce, which require a general system of uniformity in regulation, are subject only to the control of the United States Congress. In matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act, but even in this class of cases the state cannot unreasonably burden interstate commerce, Atlantic Coast Line v. R. R. Commission of South Carolina, 207 U. S. 328, and cannot obstruct it. Buck v. Kuykendall, 267 U. S. 307.

The Courts have uniformly held that states cannot regulate interstate commerce in subjects national in character and which admit and require uniformity of regulation, affecting alike all the states. Thus,

(1) Louisiana Statute was held invalid which required same accommodations for colored and white people in steamboat cabins.

Hall v. DeCuir, 95 U. S. 485.

(2) A State Statute requiring brokers in steamship tickets to procure a license, by giving proof of moral character and paying a small fee, was held invalid.

De Santo v. Pennsylvania, 273 U. S. 34.

(3) A State Commission order attempting to regulate the sale rate of electricity transmitted from one state to another was held void.

Public Utilities Commission of Rhode Island v. Attelboro Steam & Electric Co., 273 U. S. 83 (1927).

(4) A State Statute requiring Interstate common carriers of merchandise by motor vehicle to obtain a permit before using the public highways was held void.

Bush Co. v. Malloy, 267 U. S. 317 (1924).

(5) A State Statute requiring common carriers operating automobiles for hire in interstate commerce over the public highways to obtain certificates of convenience and necessity was held invalid.

Buck v. Kuykendall, 267 U. S. 307 (1924).

(6) A State cannot tax the capital stock of a foreign corporation which transports by ferry between such state and another state, even thought it holds property within such state.

Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U. S. 196, 29 L. Ed. 158.

The Court in the latter case said at page 114 U. S. 162:

"and it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation."

(7) State cannot regulate the rates of interstate railroad transportation, distinguishing between regulations of transportation of property in interstate commerce and construction of bridges by states over navigable rivers, and such like matters, where the State may act in the absence of any legislation by Congress on the same subject.

Wabash, St. Louis, Pacific R. Co. v. Illinois, 118 U. S. 557, Bk. 30 p. 244.

(8) A State Statute which imposed upon all persons engaged in interstate transportation for hire by motor vehicle over the public highways of the state, the burdens and duties of common carriers and required them to furnish indemnity bonds to secure payment of claims for injury to property carried is unconstitutional and void.

Michigan Commission v. Duke, 266 U. S. 570.

A state cannot impose a direct burden on interstate commerce or interfere directly with its freedom. Western Union Telegraph Co. v. Kansas, 216 U. S. 37, 54 L. Ed. 370. Any state statute, which in its direct result, regulates the interstate transportation of a single individual carrier violates the commerce clause of the United States Constitution. It is not a mere incident where the necessary result of enforcing the provision may be to limit or prohibit the free transportation of articles from without to a point within the state. Louisville & N. R. Co. v. Eubank, 184 U. S. 24, 46 L. Ed., 416. Even in local matters, states cannot unreasonably burden interstate commerce. Atlantic Coast Line v. R. R. Commission of South Carolina, *supra*. A state may not, in any form or under any guise, directly burden the prosecution of interstate business. International Text Book Co. v. Pigg, 217 U. S. 91, 27 L. R. A. (N. S.) 493.

We recognize that the line dividing the sphere of state regulation which is valid from that which is invalid, pending regulation by an enactment of Congress, is not easy to draw. The test recognized by the United States Supreme Court is whether the subject in question is of a local nature or whether a uniform rule is demanded for all parts of the country. With respect to rules depending on local conditions the states are permitted to exercise a considerable degree of regulation. However, the Supreme Court of the United States has, in many instances, held that a uniform rule is required and in such cases the federal power is exclusive. The rule by which this class of cases is judged

has been aptly expressed by Mr. Chief Justice Hughes in the Minnesota Rate Cases, 230 U. S. 352 at Page 399 as follows:

> "The grant of the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this Court that as to those subjects which require a general system of uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

For further statement of this rule the Court is referred to the case of County of Mobile v. Kimball, 102 U. S. 691. Alexander Hamilton in 22 Federalist, stated the necessity for such a rule as follows:

> "In addition to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.
>
> "The want of a power to regulate commerce is by all parties allowed to be of the number. * * * There is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States."

A further statement of the necessity for this rule is made by Madison in 42 Federalist and by the Supreme Court of the United States in Ward v. Maryland, 79 U. S. 418, 20 L. Ed. 449.

The length and net load of motor vehicles engaged in interstate transportation are matters demanding uniformity of regulation, if there is to be any regulation. This is true from the standpoint of the public as well as those engaged in interstate transportation business. If Congress has not seen fit to regulate the maximum length of interstate motor vehicles or the net cargo to be transported thereon, this Court should take the view that **no such regulation is desirable because this problem is not one of a local nature as the hazards arising therefrom are alike common to the inhabitants of all of our states.** If the matter be considered from the standpoint of those engaged in interstate transportation the necessity of uniformity is even more urgent. A diversity of local regulations not only seriously interferes with interstate commerce but actually, as in the case at bar, forbids its continuance because such continuance cannot be maintained save at a substantial loss to the one engaged in such interstate transportation.

Mr. H. H. Kelley of the United States Bureau of Public Roads has this to say about the matter:

> "Diversity of Laws—There are 48 states in the Union, but there are 49 different sets of regulations affecting trucks, the District of Columbia also having its special rulings. These regulations vary greatly—fixing the width at from seven to nine feet, maximum length from 40 to 85 feet, height from 12 to 14½ feet and four-wheel gross weights from about 22,000 to 40,000 pounds. The result has been frequent 'border warfare' between states, throttling of the free and economic movement of traffic, resentment by business interests, general confusion and loss to the public."

The language of Chief Justice Waite in the case of Hall, Admrx. of the estate of John G. Benson v. DeCuir, 95 U. S. 547, is pertinent to this question:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * *

"It was to meet just such a case that the commerce clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side he kept separate. Uniformity in the

regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines has been vested with the exclusive legislative power of determining what such regulations shall be. * * *

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations which the common law or the civil law, when that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, Congressional legislation is only necessary to cure defects in existing laws as they are discovered, and to adopt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the Court in Welton v. Missouri, 91 U. S. 282 (XXIII 350): 'Inaction (by Congress) * * * is equivalent to a declaration that interstate commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the states."

The case of Hall v. DeCuir, *supra,* is significant in that a change of physical equipment was required on coming

into the state of Louisiana. Although the boat might have provided an additional cabin so that state laws requiring separation of the races might be met as required by the statute of Louisiana, nevertheless the Court regarded the requirement as void. See Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., 273 U. S. 83; 71 L. Ed. 549, (1927); Bush & Sons Co. v. Malloy, 267 U. S. 317, 45 Sup. Ct. Rep. 326.

In the case of Buck v. Kuykendall, 267 U. S. 307 (1924), Mr. Justice Brandeis, speaking for the Court said—

> "Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways."

In the case of Morris v. Duby, 274 U. S. 135, the Court quotes from the Kuykendall case, 267 U. S. 307, at page 315 as follows:

> "In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

This quotation, as an examination of the Kuykendall case shows, is **not a statement of the view of the Court, but of the argument of counsel.** After the recital of the argument of counsel in the opinion as embodied in the quotation above, Mr. Justice Brandeis, continuing the opinion on page 315, says:

> "The argument is not sound."

The opinion in Morris v. Duby, *supra,* can be taken only in connection with an internal regulation of the state applying only to intrastate transportation. The unreasonableness of the order could not have been important except with respect to the due process clause and that point seems not to have been considered.

If it should be considered that limitation of the gross weight of motor vehicles in interstate commerce comes within the power of the several states to make local regulations until Congress acts, still there is a vast difference between limitation of gross weight and limitation of length and net load. Whatever reason there is for limitation of length applies in all states alike; **and there is no sound reason for limiting the net cargo of a vehicle,** unless it be to prevent competition, and certainly such purpose would be ineffective as to interstate transportation.

It is submitted that the channels of interstate commerce should not be damned by arbitrary restrictions such as those regulating the net cargo as provided in Section 5 of this Act. The restriction should in any event have some fair and reasonable relation to the object of the law. When it appears that the restriction is remote and speculative from the standpoint of protecting state highways, it should be stricken down as an interstate barrier to the free transportation of commodities between the several states. Whatever injustice the legislature of Texas may be permitted to do in so far as its intrastate commerce is concerned, this Court should not permit this statute, disguised as a regulatory measure, to block the free flow of commodities between the several states of the Union. We respectfully urge that the Court declare this statute invalid, certainly as to the weight restrictions, if not as to the length restrictions, in so far as interstate carriers are involved.

POINT IV.

Subdivision (f) of Section 3 of said Act creates a classification which is unreasonable, arbitrary and discriminatory and without any substantial relation to the purposes of the act, thus violating the equal protection and due process clauses contained in the Fourteenth Amendment to the Constitution of the United States:

(a) In making a distinction between commodities which are boxed or bound in containers or binders and those not so boxed or bound; and,

(b) In making a distinction between commodities which are boxed or bound in bales or packages of thirty cubic feet or more in bulk and weighing more than five hundred (500) pounds and those boxed or bound in bales or packages of less bulk and weight.

A separate brief by Intervener W. T. Stevens is being filed herein with respect to the invalidity of subdivision (f) of Section 3 of said Act.

A companion law to the Act under review was passed by the last session of the Legislature of Texas, known as the "Cotton Transportation Law", House Bill 628. This law attempted to accomplish by a separate act the purpose which subdivision (f) of Section 3, House Bill 336 is designed to accomplish. This law was declared invalid by a Three-Judge Court in the case of McLeaish & Co. v. Binford, 52 Fed. (2nd) 151. The decision was subsequently approved by the Supreme Court of the United States. (Mem. 76 L. Ed. 267).

We believe that it is apparent from said section and the evidence introduced in reference thereto, as is ably argued in the brief of Intervener W. T. Stevens herein filed, that this section of the Act violates the express provisions of the Fourteenth Amendment to the Constitution of the United States.

POINT V.

Section 3 of said Act is repugnant to the equal protection clause contained in the Fourteenth Amendment to the Constitution of the United States for the reason that there are created classifications which are unreasonable, arbitrary and discriminatory and without any substantial relation to the purposes of the Act, in that:

(a) The limitations as to size of vehicles do not apply to farm tractors and implements of husbandry, including machinery used solely for the purpose of drilling water wells and highway building and maintenance machinery temporarily propelled or moved upon the public highway; and,

(b) Under the conditions named in section 7, vehicles are not restricted to the length limitations imposed by section 3.

Discussion of the First Division of the Point.

It will be noted that Section 3 of the Act restricts the size of vehicles including length, width and height. The exception in favor of implements of husbandry reads as follows:

> "And except further, that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry, * * *"

In 30 Corpus Juris, the term "husbandry" is defined as: "Agriculture in its general sense; the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces; the business of a farmer comprehending the various branches of agriculture."

If husbandry is the business of a farmer comprehending the various branches of agriculture, it necessarily follows that any implement, truck or vehicle used in connection with this business is an implement of husbandry.

We realize that the Trial Court found (R., 137) that the term "implements or husbandry" referred only to plows, threshing machines, hay-presses and the like, when being moved from one farm or place to another, and that the term "implement of husbandry" was qualified by the phrase "temporarily propelled or moved upon the public highways." We submit, however, that this is not the correct interpretation of the term "implements of husbandry" and that the phrase "temporarily propelled or moved upon the public highways" is a limitation upon the use of "highway building and maintenance machinery," and not upon the term "implements of husbandry." The phrase "implements of husbandry," as used in this particular statute, has never been passed upon by the Supreme Court of Texas, although on December 23, 1931, the Court of Criminal Appeals of Texas, in the case of Cecil Reeves, Appellant, v. The State of Texas, Appellee, 40 S. W. (2nd) 150, construed the term "implement of husbandry" to cover only farm machinery and not trucks used as an incident to the business of farming. **This decision has not become final as the Court has never passed upon the motion for rehearing which was filed in said cause.**

However, the term "implements of husbandry" has been construed by the Supreme Court of Texas in a statute where its use is almost identical to the use of said term in this Act. We refer to the case of Allred v. Engelman, 40 S. W. (2nd ed.) 945, decided by the Court of Civil Appeals at San Antonio, **where the Supreme Court denied a writ of error.** In that case the Court held that a truck, upon which was placed a metal tank to convey water to the farm, was an implement of husbandry while being used in the operation of hauling water over the highways for irrigation purposes. The case arose under a Texas Statute (Article 6675-a; Chap. 23, Acts 5th Called Session; 41st Leg.) containing an exception in favor of "implements of husbandry," exempting them from registration, which read as follows:

> "That owners of farm tractors, farm trailers, farm semi-trailers and implements of husbandry operated or moved temporarily upon the highways shall not be required to register such farm tractors, farm trailers, farm semi-trailers or **implements of husbandry.**"

The term "operated or moved temporarily upon the highways" is defined by the same Act as follows:—

> "By 'operated or moved temporarily upon the highways' is meant the operation or conveying between different farms, and the operation or conveyance from the owner's farm to the place where his farm produce is prepared for market or where same is actually marketed and return."

The State was restrained from collecting the registration fee on the trucks of Engelman, who was using them to haul water over the highways to his citrus fruit farm for irrigation purposes. It was decided that trucks so used were implements of husbandry.

The exception in Section 3(a) of the Act under review does not say:—"implements of husbandry temporarily propelled or moved upon the public highways;" the exception as contained in the statute is "that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry," * * *. We do not believe there is anything in the statute warranting the conclusion of the Trial Court in this case that that exception only applies when such vehicles are being temporarily propelled or moved upon the public highways. Certainly there is nothing in the Act warranting the construction that it applies to such implements when moved "in the usual course of farm work from farm to farm, etc." The statute does not limit the movement to such restricted operations, but permits and authorizes such implements to move over the highways to any place in the State, and as often as desired, with impunity.

Even the other statute above referred to, which defines the

term "operated or moved temporarily upon the highways" does not restrict or limit the movement from farm to farm, etc., as stated in the Trial Court's opinion on the hearing for a temporary injunction. (R., 103) We call this Court's attention to the definition in the statute construed in Allred v. Engelman, supra, wherein it is said that by such term "is meant the operation or conveying between different farms, and the operation or conveyance from the owner's farm to the **place where his farm produce is prepared for market or where same is actually marketed, and return.**"

Under the exception contained in Section 3, a truck used by a farmer in connection with his dairy or farm can be operated to any point in Texas and return without any restriction as to the size of his vehicle. This exception in favor of implements of husbandry is even broader than the exception upon which the Supreme Court of the United States struck down the Florida Act. Under the exception in that Act the transportation of farm products was limited to operation "from the point of production to the assembling or shipping points en route to primary market."

Mr. Chief Justice Hughes, in Smith v. Cahoon, supra, dealing with this specific exception, said:

> "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products * * * and those who carry for hire bread or sugar, or tea or coffee or groceries in general or other useful commodities. So far as the Statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made. (Citing numerous authorities.)'"

In Loosing v. Hughes, 244 S. W. 556, a Texas court, in holding a similar statute invalid containing an exception in favor of "implements used for agricultural purposes," used substantially the same language as Mr. Chief Justice Hughes in Smith-Cahoon, supra.

Under the privileges of this exception in favor of "implements of husbandry," the 5,000,000 bales of cotton, 70,000,000 bushels of wheat and other farm products in like quantities produced annually in this State, may be moved from the farm and other interior points over the highways to the ports and other markets on "implements of husbandry" (trucks) unrestricted as to size without incurring the severe penalties provided for in House Bill No. 336, On the other hand, if Complainant operates a truck over the highway even though it be of the same make as the "implement of husbandry," which exceeds by one inch the dimensions permitted in the Act; he at once becomes subject to criminal prosecution.

We are at a loss to understand how the Court arrived at the conclusion that this exception "clearly has reference to the movement in the usual course of farm work, from farm to farm, etc., of such implements as **tractors, plows, trucks, hay-presses,** etc., sometimes upon their own power, and not to the transportation of such farm implements in the manner insisted by Complainant." The provisions of House Bill No. 336 have no reference to "plows. hay-presses," etc., being moved on their own power or otherwise. The Bill deals primarily with motor vehicles and the declared purpose of it is to restrict the size of vehicles and the load that may be carried upon any such vehicles. We call the Court's attention to the definitions of the various vehicles included in the Bill. For instance, "vehicle" is defined as "every mechanical device in, upon, or by which any person or property is, or may be, transported or drawn upon a public highway," etc.; there are other definitions in the Bill covering "motor vehicle," "commercial vehicle," "truck tractors," "trailers" and "semi-trailer." Each

such vehicle is defined as an instrument for carrying or transporting persons or property and could not by any stretch of the imagination include "plows and hay-presses" moving in the usual course of farm work from farm to farm. The only reasonable construction that can be placed upon this bill is that the exception complained of grants to implements of husbandry the right to operate without restriction as to size of the vehicle upon which is transported property. The entire Act deals with size of vehicles and the loads that may be carried thereon and there is nothing in the Act warranting the construction that this exception merely applied to "plows and hay-presses" being moved "from farm to farm." Wilberts v. Richard, 119 Southern 411; Dowd v. Henson, 252 Pac. 260; Federal Agency Investment Company v. Baker, 252 Pac. 262; Printz v. Shepard, 276 Pac. 811; 31 Corpus Juris 232.

Discussion of the Second Division of the Point.

The provisions of Section 7 of said Act, whereby, under named conditions, vehicles having a length of 55 feet, may be operated on the highways of Texas, make a purely arbitrary classification in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and therefore render the length provisions of said Act null and void. Buck v. Kuykendall, 267 U. S. 307; Frost v. Corporation Commission, 278 U. S. 515; Forbes Pioneer Boat Line v. Board of Commissioners, 278 U. S. 338, 66 L. Ed. 647; Jones v. Union Guano Company, 264 U. S. 171, 68 L. Ed. 623; Mott, "Due Process of Law (Bobbs-Merrill, published May 3, 1926), pages 288, 539, 567, 575, 587 and 597.

The testimony in this record (R. 170) makes it clear that the tremendous volume of agricultural products of Texas is carried to the primary market by means of trucks. Beginning in the southern part of Texas, in the valley of the Rio Grande, and extending to the far northern part of the

plains in the Panhandle there is a continuous movement throughout the year of farm products of all kinds. A great portion of this movement can, under the provisions of Section 7, be transported in trucks having a length of 55 feet, and yet all other trucks under the provisions of Section 3 of this Act are restricted to a length of 35 feet. This is gross discrimination condemned by the provisions of the Fourteenth Amendment to the Constitution of the United States. **What justification can there be in law or in good conscience to permit a certain class of people throughout the State of Texas to use in their business vehicles having a length of 55 feet and prohibit such use to all who do not fall within the preferred class enumerated in Section 7 of this Act?** What is "sauce for the goose should be sauce for the gander." If Mr. A, transporting merchandise from Fort Worth, Texas, to Dallas, Texas, is restricted to the use of a vehicle 35 feet in length, then there is no justification in permitting Mr. B, a farmer, to haul his produce to Fort Worth in a vehicle 55 feet in length. This is rank discrimination; it is the essence of class legislation; it is the type of law expressly condemned by this Court in numerous decisions, the most recent of which is the case of Smith v. Cahoon, 51 S. Ct. 582, 75 L. Ed. 1264, and in the case of Connolly v. Union Sewer Pipe Company, 46 L. Ed. 690-691, cited by Mr. Chief Justice Hughes in the Smith v. Cahoon case. We can not justify discriminations of this kind by saying that there is a difference between the classes involved. When a classification is made there must be some difference which bears a just and proper relation to the attempted classification,—not a mere arbitrary selection. In this case the Legislature of Texas has made a **mere arbitrary selection** by granting a special privilege to those who transport to common carrier receiving points (in fact, railroad stations), and denying such privilege to others who carry in competition with railroads. The vehicles of the former are permitted to be 55 feet in length, while the vehicles of the latter are restricted to 35 feet.

It is submitted that the Court should declare this Act invalid, in its length restrictions, because of this inequality which violates the express language of the Fourteenth Amendment to the Constitution of the United States as construed by this Honorable Court in so many decisions as to require the citation of no additional authorities.

POINT VI.

Section 2 of House Bill 336 is invalid for the reason that it delegates to the Highway Department power to suspend, in violation of Section 28, Article I, of the Texas Constitution, and the Fourteenth Amendment to the Constitution of the United States, the penal provisions of the act.

Section 2 of the Act is set out in full in Appendix A to this Brief, but the part complained of is:

> "It shall be unlawful and constitute a misdemeanor for any person to drive, operate or move, or for the owner to cause or permit to be driven, operated, or moved on any highway, any vehicle or vehicles of a size or weight exceeding the limitations stated in this Act or any vehicle or vehicles which are not constructed or equipped as required in this Act, or to transport thereon any load or loads exceeding the dimensions or weight prescribed in this Act; **provided the Department acting directly or through its agent or agents designated in each county, shall have and is hereby granted authority to grant permits limited to periods of ninety (90) days or less for the transportation over State highways of such overweight or overlength commodities as cannot be reasonably dismantled or for the operation over State highways of super-heavy and over-size equipment for the transportation of such over-size or over-weight or overlength commodities as cannot be reasonably dismantled, provided, that any haul or hauls made under such permits shall be made by the shortest practicable route.**

The Legislature may delegate to administrative officers the duty to find facts but the statute should impose the duty, once the facts have been found, to act. The applicant should at some stage of the proceedings have his day in court.

The uncontrolled discretion of granting or refusing the

permit should not be vested in such officers, without ultimate redress accorded to the applicant. The right to decide should carry with it the corresponding duty to act.

In the case of Ex Parte Faison, 248 S. W. 343, the court of Criminal Appeals of the State of Texas, being court of last resort in all Criminal matters in this State, passed upon a statute substantially identical to the one now to be construed. The Act construed in that case prohibited a motor vehicle from transporting over the highway a net load in excess of eight thousand pounds. The officers charged with the supervision and care of the highways were vested with authority to issue permits for loads in excess of this weight **if such officer should determine that the highway over which such vehicle was to travel would sustain the same without MATERIAL INJURY.** In this Act, a similar privilege is granted to **the same officers if such officer should determine** that the commodity weighing in excess of the net load limit COULD NOT BE REASONABLY DISMANTLED.

The Statute construed in the Faison case is for all practical purposes identical to the one now before this court, excepting only that the Statute in the Faison case left the officer to determine whether **material injury** would be done to the particular road and here there is left to the officer to determine whether the commodity sought to be transported is **capable of being dismantled.** In **principle** no closer parallel could be found; Justice Lattimore, speaking for the court of Criminal Appeals in the Faison case, said:

> "The plain effect of this is to remove the maximum limit upon truck loads at the pleasure of the Highway Commission and to delegate to such Commission authority to grant to any truck operator, no matter how heavy his pay-load or vehicle, the right and permission to so operate same upon public highways, in which event he could not be penalized unless he exceeded the extra weight, etc., fixed by the officers

> of the Highway Commission. In other words, without specifying under what named conditions, the unlimited power of permission to operate with heavier loads than those named in the Statute is given to the Highway Commission." (248 S. W. page 345.)

It is obvious that under the provision of Section 2 the Legislature in the instant matter attempted to delegate to the highway department and its officers and agents the right to suspend the operation of a law under given circumstances, the determination of the existence of such circumstances being solely within their uncontrolled discretion with no right of appeal, no relief from the exercise of arbitrary discrimination and without the slightest attempt to establish such rules or provisions for guidance as is required and found necessary in so many cases sustained by the authorities from which we will attempt to quote only in part.

The Texas Constitution, Article 1, Section 28, provides:

> "No power of suspending laws of this State shall be exercised except by the Legislature."

It is obvious here, as in the Faison case, supra, that the highway department, its officers and agents, are authorized to suspend the operation of the law, thereby rendering the same repugnant to both the Constitution of the State of Texas and the due process clause of the Fourteenth Amendment. No duty is imposed on the Commission or its agents to grant a permit under named conditions, but the uncontrolled discretion to give or deny permits is conferred upon the representatives of the Highway Commission. From their decision there is no appeal regardless of the state of facts justifying the issuance of a permit.

In the case of Washington vs. Roberge, 278 U. S. 116, this court, speaking through Justice Butler, said:

"The superintendent is bound by the decision or inaction of such owners. **There is no provision for review under the ordinance; their failure to give consent is final.** They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. Yick Wo. vs. Hopkins, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 225, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

The opportunity for discrimination is obvious in that an officer in one county may grant the privilege of transporting such excessive load for a period of ninety days over highways five hundred miles away and an agent in another county could refuse a like request by parties similarly situated carrying the same objects. In no event does a definite state of facts entitle anyone to a permit **as a matter of right.** Such is left to the discretion of officers who, like Caesar, can grant or withhold the favor as their whim or caprice may determine.

A law of this type has not alone been condemned in practically every state including Texas, but likewise condemned by the Supreme Court of the United States in the well considered and often quoted case of Yick Wo vs. Hopkins, supra. In that case attempt was made to rest with the Board of Supervisors the power to grant the privilege to maintain a laundry within the limits of an incorporated city, located in a building not constructed of either brick or stone. The Act now before this Court leaves to the officer the determination of whether the commodity in question can be dismantled, **and if so determined there is no obligation to grant the same.** The provision in the Hopkins case left to the Board of Supervisors a similar discretion of granting or withholding a permit for operating a laundry. Mr. Justice Mathews in delivering the opinion of the United States Supreme Court, which invalidated that Statute in the Hopkins case, said:

"There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to place, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of **mandamus** to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

So in this case if Mr. X requests a permit to carry a 10,000 pound boiler which cannot reasonably be dismantled, the law does not require the Highway Agent to issue a permit, **but merely authorizes such to be done if it meets with the pleasure of the agent, leaving no redress to the applicant.** Valuable rights of such importance cannot thus be handled without "guidance or restraint."

In the case of Marx vs. Maybury, 36 Fed. (2nd) 397, the District Court for the Northern District of the State of Washington, in construing the Statute of the State of Washington, requiring the license of apprentice barbers and the operation of barber colleges under permit from the Director of licenses, held that Statute to be void. The Court, speaking through Judge Neterer, said:

"The power given the director of licenses to revoke or withhold permit from a 'Barber School' or 'Barber College' when, in his judgment, it is not

financially able to carry out any contract for instruction, uncontrolled by any standard or **rule or provision of review, is repugnant to the due process clause of the Fourteenth Amendment.**"

In the case of City of Shreveport vs. Herndon, 105 So. 240, the Supreme Court of Louisiana considered the validity of a certain traffic ordinance passed by the city of Shreveport under which ordinance it was attempted to be delegated to the Commissioner of Public Safety the creation of rules and regulations pertaining to the traffic in said city. The ordinance in no wise attempted to prescribe any rule or regulation of such Commissioner and the court, speaking through Judge O'Neill, said in part as follows:

"**The general rule is that any Statute or ordinance that purports to vest arbitrary discretion in a public officer, without prescribing a definite rule for his guidance, is unconstitutional.** 12 A. L. R. 1436; Yick Wo vs. Hopkins, Sheriff, 118 U. S. 356, 6 S. Ct., 1064, 30 L. Ed. 220; State vs. Mahner, 43 La. Ann. 496, 9 So. 480; State vs. Dubarry, 44 La. Ann. 1119, 11 So. 718; State vs. Kuntz, 47 La. Ann. 107, 16 So. 651; City of New Orleans vs. Palmisano, 146 La. 518, 83 So. 789; City of New Orleans vs. Babie, 146 La. 550, 83 So. 826; State vs. Carter (No. 27263), 105 So. 247 (Not yet (officially) reported). The rule is not without exception or modification, of course, because some situations, and some statutes or ordinances, in the very nature of things, require the vesting of discretion in a subordinate commission or in the officer charged with the duty of enforcing the Statute or ordinance; e. g., where it is impracticable to lay down a definite or comprehensive rule, or where the discretion relates to the enforcement of a police regulation requiring prompt exercise of judgment. City of New Orleans vs. Sanford, 137 La. 628. See page 647, 69 So. 35, L. R. A. 1916 A, 1228. * * * Besides, the cases in which it has been found necessary and proper that a police regulation should leave some discretion to the officer charged with the duty of

enforcing it, and not undertake to prescribe a definite or comprehensive rule for his guidance, **relate to executive or administrative duties.**"

In the case of State vs. Carter, 105 So. 247, the Supreme Court of Louisiana construed an act of the Legislature which permitted the Highway Commission to grant special permit to passenger motor vehicles carrying in excess of seven passengers, to travel at a speed exceeding 25 miles per hour. That court, speaking through Judge O'Niell, said:

> "Our opinion is that the eleventh section of the statute is violative of the Fourteenth Amendment. A statute or an ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right by granting or withholding a license or permit or approval, arbitrarily or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment."

In the case of the Cicero Lumber Company vs. Town of Cicero, 51 N. E. 758, the Supreme Court of Illinois therein construed the act of the Legislature of that State and the Court speaking through Judge Magruder said:

> "The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured. This position is sustained by the weight of authority."

We recognize the well settled exceptions that matters may be left to discretion where it is impossible to pass an act which will comprehend every situation that might arise or where circumstances might be such that would necessitate the prompt exercise of judgment on the part of an officer, but no such situation is presented here. This Act leaves solely to the discretion of many officers the determination in all instances of whether or not a particular commodity can or cannot be dismantled and safely transported but does not compel the issuance of a permit when conditions arise which require such to be granted. The opportunity for discrimination is apparent. No right of appeal or review is provided by the Act. It bestows the prerogatives of a dictator.

POINT VII.

The Court erred in admitting, over appellants' objection, the hearsay testimony of Witness George Knapp, as to the capacity of various Texas bridges to sustain certain loads.

On the trial of this case appellees offered the testimony of the Witness George A. Knapp (R., 272). The witness stated that he had made a "compilation of the safe loading which those bridges will carry under the computations of the Highway Department" (R., 272). He further stated:

> "What I have there is merely a compilation of what I was informed by the Bridge Engineer of the State Highway Department was his official data on record in the State Highway Department; I examined them personally; I found them in the Highway Department records. The data was made available to me by the Bridge Engineer of the State Highway Department. The members of his department gathered the plans together and interpreted the plans and I might say that the statement that is attached as exhibit setting forth the location of the bridges together with the safe bearing loads, was submitted to the scrutiny of the State's Bridge Engineer, and a copy is on file in his office. It bears his approval."

Thereupon the Appellees (Respondents in Trial Court) offered in evidence the affidavit of George A. Knapp, to which was attached the schedule of bridges showing safe load capacities on Texas State Highways, together with the explanation thereof. (R., 273 to 279.) This record purports to show a list of approximately 122 bridges designating the highway on which each bridge is located, the county wherein the bridge is situated, the nearest town, the name of the stream, the date built, the safe load of bridge-tons, and whether or not the bridge was a one or two-way bridge. Without here copying in detail all of said schedule shown in the record, pages 275 to 279, inclusive, the above will suffice to show the nature of the testimony offered.

When said testimony was offered the Appellants objected thereto for the reason that the same was inadmissible for any purpose, hearsay and not the best evidence (R., 272). The objection was overruled by the Court, to which action the appellants duly excepted (R., 272).

The admission of this hearsay testimony was very prejudicial to appellants, as appears from the Findings of Fact made by the Trial Court (R., 134), in which the Court gave great consideration to the alleged weakness of bridges to carry loads in excess of that shown by the above-mentioned schedule to be the capacity of said bridges. (See Finding of Fact No. 19, R., 134) Such evidence evidently influenced the Court in its 20th Finding of Fact (R., 135) and unduly influenced the Court in the 43d Finding (R., 140). It would appear perfectly clear that Appellants' objection to said testimony was well taken. The evidence in question did not come within the scope of the stipulation as to certain testimony (R., 149).

It is submitted that the aforesaid testimony was improperly admitted over objection of Appellant; that the testimony was prejudicial; and that the Court erred in permitting such testimony to be made a part of the record upon which it based its decision of this case. Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. Rep. 907; Donnelly v. United States, 228 U. S. 243, 33 Sup. Ct. Rep. 449.

POINT VIII.

Sections 5 and 2 of said Act are invalid because they impair the obligation of contracts, in violation of Article 1 of the Constitution of the United States, in that appellants cannot comply with the obligations of valid contracts entered into prior to the passage of said act, on account of the unreasonable length and weight restrictions imposed by said sections.

It was undisputed that Appellants and various Interveners had entered into various contracts for the transportation of different commodities prior to the adoption of the Act in question and in reliance upon the assumption that said contracts could be fulfilled by the use of their vehicles then duly licensed by the State of Texas but which now are forbidden the use of the highways under the length restrictions of this law. For all practical purposes, the weight restriction of the law also prevents the utilization of those vehicles which comply with the length provisions, for the reason that said vehicles are of such structure and design as to be unsuited for the economical transportation of a cargo limited to 7,000 pounds. It would be entirely too expensive to use vehicles designed for much larger loads under a 7,000-pound net cargo restriction. (R., 149; R., 1; R., 83)

The Trial Court specifically found:

> "That Complainant prior to and at the time of the passage of House Bill 336 had unexpired contracts with shippers predicated upon the former load weight permitted by law, and had equipment especially designed to carry out such contracts, on which equipment Complainant will sustain a loss but not a total loss. Complainant will also sustain a loss under such contracts." (R., 127)

Similar findings of fact were made with respect to practically all of the Interveners and particularly with respect

to Intervener Bull-Stewart Equipment Company which had a contract for the distribution of Ford automobiles (R., 130). The last-named Intervener can not carry but three automobiles on his trucks under the restrictions of House Bill 336, whereas, his contract was of such a nature as to require the transportation of four cars in order that this Intervener could make any profit under said contract. In carrying three automobiles, said Intervener must comply with his contract at a large and substantial loss to himself. (R., 130)

The allegations of Complainant and all Interveners are to the effect that the weight restrictions of House Bill 336 will virtually destroy their respective businesses (R., 1-56), increasing costs of transportation to such an extent that it would be virtually impossble to carry on these respective businesses. The Trial Court found that Complainant and Interveners had built up large and substantial businesses aggregating in value several millions of dollars, and that "due to the size and weight of said combinations and the cost of their operation they can not limit the load to the 7,000 pounds prescribed by the Act and operate without a loss" (R., 127-132).

We submit that the Legislature of Texas has unconstitutionally impaired the obligations of Appellants' contracts. Detroit United Railway v. Michigan, 242 U. S. 238; Louisiana R. & Nav. Co. v. Behrman, 235 S. W. 164, 170; Butchers' Union Slaughter Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 752, 754.

POINT IX.

Sections 2, 3, 5 and 7 of House Bill 336 are so interwoven as that they cannot be separated and if, for any of the reasons herein set forth, any one of said sections is invalid, then all of said sections relating to the length of vehicles and the net load that can be carried thereon will be declared invalid.

The true rule in reference to the severability of particular sections in an act, such as the one under review, is that the Court will not hold an act to be valid where a particular section is declared illegal, unless it is certain that the Legislature would have enacted the law regardless of the invalidity of a particular section. Williams v. Standard Oil Co., 278 U. S. 235, 73 L. Ed. 287. We think the rule aptly stated in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, wherein the Court said:

> "But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the Act * * * embraces all persons * * * who combine their capital * * *, while the ninth section declared that the statute shall not apply to agriculturalists or livestock dealers. Those classes would in that way be reached and fined with respect to their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, as it stands, will apply to agriculturalists and livestock dealers, then, evidently, the legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its operation and thereby protected from prosecution."

Willoughby, on the Constitution of the United States, 2nd Ed., Section 23, states the rule as follows:

> "The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law if it is possible to separate the invalid provision from the other provisions without destroying or impairing their efficiency to attain the results evidently intended by the Legislature that enacted it. Even when thus separable, however, the court will not hold the remainder of the law valid if there is doubt whether, the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only. Thus in the case of Howard v. Illinois C. R. Co., 207 U. S. 563, the court, having held that the act by its terms related to intrastate as well as interstate commerce, declined to hold the act valid even as to employees engaged in interstate commerce. The Court said: 'As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate'."

The United States Supreme Court refused to separate the operation of the Civil Rights Act as to American vessels upon the high seas more than a marine league from the land, and the District of Columbia and the territories, from its operation as to other persons "within the jurisdiction of the United States". Butts v. Merchants & Miners Transportation Co., 230 U. S. 126.

Whenever a statute is determined to be unconstitutional in part, then the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they can not be sep-

arately enforced; or, if so enforced, will not effectuate the manifest intent of the legislation. International Text Book Co. v. Pigg, 217 U. S. 91; Dorchy v. Kansas, 264 U. S. 287, 68 L. Ed. 686.

If a case comes under a provision of a statute that is valid and another provision of the statute inseparable from the first is void, both provisions of the statute are void. Spraigue v. Thompson, 118 U. S. 540; Lemke v. Farmers Grain Co., 258 U. S. 50.

A penal statute is strictly construed and a proviso in a penal statute is liberally construed. A proviso is held inseparable from other parts of a penal statute where, if the statute were not penal, the parts might be separable. Butts v. Merchants & Miners Transportation Co., 230 U. S. 126; James v. Bowman, 190 U. S. 127.

We quote from the opinion of Mr. Justice White at page 366 in Guinn v. United States, 238 U. S. 347, as follows:

> "That the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the State, we must determine it for ourselves.
>
> "The rule to save valid parts of an enactment does not apply, (as stated on page 366,) where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intendment of the provision under consideration so compels or where such a result is rendered necessary because to follow the contrary course would give rise to such an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been upon any hypothesis whatever within the mind of the lawmaking power."

It is clearly apparent that the Legislature of Texas would not have adopted the length and weight restrictions of Sections 3 and 5 unless it had considered the provisions

of Sections 2 and 7 were valid. All are essential to the regulation program which the Legislature had in mind when it passed this law. Therefore, the invalidity of any one of such sections would necessarily result in this Court holding all of the length and weight restrictions invalid.

Moreover, if the weight and length provisions of the Act are invalid as to interstate carriers, they must be held invalid as to intra-state carriers, for it is obvious that the Legislature of Texas would not place its own citizens engaged in local commerce at such a decided disadvantage with interstate carriers as would be the case if the latter were excluded from the effect of these sections of the law. Ruling Case Law, Vol. 6, page 129.

We are at a loss to see how the Court could declare that portion of Section 2 a valid law, in view of the delegation of legislative power therein contained. It comes clearly within the condemnation of this Court in the case of Yick Wo v. Hopkins, 118 U. S. 356, and the numerous cases following the rule therein announced.

It would also seem equally clear that the indefinite and uncertain provisions of Section 7 render this portion of the Act invalid. To the general situation of vagueness and uncertainty, the use of the qualifying phrase "nearest practicable" applied to "receiving point" and of "shortest practicable" applied to "route" add indefiniteness to an otherwise uncertain provision which should not be permitted in a penal statute. Connally v. General Construction Company, 269 U. S. 385, 391; United States v. Cohen Grocery Co., 255 U. S. 81.

CONCLUSION.

In accordance with the foregoing it is respectfully submitted that the decision of the Three-Judge Court should be reversed and that the aforesaid provisions of this statute, separately and as a whole, should be held un-

constitutional and the enforcement of their provisions against these Appellants should be permanently enjoined.

Respectfully submitted,

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APPENDIX A

NEW LAW

H. B. No. 336

AN ACT

To amend Chapter 42, General Laws of the State of Texas, 41st Legislature, 2d Called Session, so as to further regulate the operation of vehicles on the public highways; defining the term "vehicle"; making it unlawful to operate or cause to be operated a vehicle of a size or weight exceeding the limitations prescribed in this Act, with exceptions providing for permits for certain vehicles and loads exceeding the limitations prescribed in this Act; prescribing the width, height, and length of vehicles and combinations of vehicles and loads which may be lawfully operated on public highways; limiting the extent to which any part of the load may extend beyond the front or rear of any vehicle or vehicles; limiting the extent that any load may extend beyond the sides of any passenger vehicle; making it unlawful to operate any motor vehicle having a load in any container, box or binding containing more than thirty (30) cubic feet and weighing more than five hundred (500) pounds where there are more than fourteen (14) of such containers upon any vehicle or combination thereof; providing for the displaying of red flags or red lights whenever the load or drawbar or coupling of a vehicle extends beyond the rear or the bed or the body thereof; prescribing the maximum load that may be carried on public highways by any commercial motor vehicle, truck-tractor, trailer, or semi-trailer, or combination or train of such vehicles operating outside of the limits of an incorporated city or town, and prescribing the maximum weight per inch width of tire for any motor vehicle that may be operated on a public highway, providing that such provisions as to maximum load and maximum weight per inch width of tire shall not become effective until January 1, 1932; providing that applicants for registration of any commercial motor vehicle, truck-tractor, trailer or semi-trailer shall make and deliver to the tax collector an affidavit showing the weight of the vehicle, which weight shall also be shown on the license receipt which shall be carried on any such vehicle at all times, and making said affidavit prima facie evidence of the weight of said vehicle; providing certain exceptions to

the limitations imposed by this Act as to length of vehicle or combination of vehicles and weight of loads, and of height of vehicle with load when such vehicle is used only to transport property by way of the shortest practicable route over the public highway under specified conditions; regulating the number of trailers which may be drawn by or attached to any motor vehicle; limiting the length of the drawbar, or other connection between any two vehicles; regulating the speed of vehicles, commercial motor vehicles and motor vehicles transporting passengers for hire; providing for the carrying of certain clearance lamps or reflectors and lamps or lanterns on certain vehicles and prescribing an exception for vehicles drawn by animal power; requiring the keeping of certain lamps on vehicles lighted under certain conditions; providing that it shall be unlawful to operate any vehicle upon the highway with a red light visible directly from the front thereof with exceptions; prescribing character of and regulating use of brakes, horns and warning devices; providing that every motor vehicle engaged in the transportation of passengers for hire shall be equipped with a fire extinguisher; providing that it shall be unlawful for any person to operate or permit to be operated any commercial motor vehicle of over one ton carrying capacity upon the highway without having a chauffeur's license; making the violation of any provision of this Act a misdemeanor, and fixing and providing penalties and punishments; reserving certain powers to governing bodies of cities and towns; providing that the unconstitutionality of any part or parts of this Act shall not affect the validity of the remaining parts thereof; repealing all laws or parts of laws in conflict herewith, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. That Section 1 of Chapter 42, General Laws of the State of Texas passed by the 41st Legislature, 2d Called Session, relating to the operation of vehicles on the public highways, be and the same is hereby amended to hereafter read as follows:

"**Section 1.** The following words and phrases, when used in this act, shall, for the purpose of this Act, have the meanings respectively ascribed to them in this section, as follows:

"'Vehicle.' Every mechanical device in, upon or by which any person or property is or may be transported or drawn upon a public highway, including motor vehicles, commercial motor vehicles, truck-tractors, trailers, and semi-trailers, severally, as hereinafter defined, but excepting devices moved by human power or used exclusively upon stationary rails or tracks.

"'Motor Vehicle.' Every vehicle, as herein defined, which is self-propelled.

"'Commercial Motor Vehicle.' Any motor vehicle other than a motorcycle, designed or used for the transportation of property, including every vehicle used for delivery purposes.

"'Truck-tractors.' Every motor vehicle designed or used primarily for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

"'Trailer.' Every vehicle without motive power designed or used for carrying property or passengers wholly on its own structure and to be drawn by a motor vehicle.

"'Semi-trailer.' Every vehicle of the trailer type so designed or used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another motor vehicle.

"'Department.' The State Highway Department of this State, acting directly or through its duly authorized officers and agents."

Section 2. That Section 2 of said chapter be and the same is hereby amended to hereafter read as follows:

"Section 2. It shall be unlawful and constitute a misdemeanor for any person to drive, operate or move, or for the owner to cause or permit to be driven, operated, or moved on any highway, any vehicle or vehicles of a size or weight exceeding the limitations stated in this Act or any vehicle or vehicles which are not constructed or equipped as required in this Act, or to transport thereon any load or loads exceeding the dimensions or weight prescribed in this Act; provided the department, acting directly or through its agent or agents designated in each county, shall have and is hereby granted authority to grant permits limited to periods of ninety (90) days or less for the transportation over State highways of such overweight or oversize or overlength comodities as cannot be reasonably dismantled or for the operation over State highways of super-heavy and over-

size equipment for the transportation of such oversize or overweight or overlength commodities as cannot be reasonably dismantled; provided, that any haul or hauls made under such permits shall be made by the shortest practicable route; provided further, that the department shall designate the county judge of the respective counties in addition to its other designated agents, who acting under the direction of the department shall have and are hereby granted authority to issue such permits over State highways; and provided further, that the Commissioners' Courts through the county judges of the several counties of the State shall have and are hereby granted authority to grant such permits over the highways of their respective counties other than State highways, and the said county judges shall have and are hereby granted said authority independently of the said Commissioners' Courts until such time as the said courts shall have acted with respect thereto. Said Commissioners' Courts, in their discretion, may require a bond to be executed by an applicant in such amount as will guarantee the payment of any damages which any road or bridge traversed or crossed may sustain in consequence of the transportation aforesaid."

Section 3. That Section 3 of said chapter be, and the same is hereby, amended to hereafter read as follows:

"Section 3. (a) No vehicle shall exceed a total outside width, including any load thereon, of ninety-six (96) inches, except that the width of a farm tractor shall not exceed nine (9) feet, and except further, that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways.

"(b) No vehicle unladen or with load shall exceed a height of twelve feet six inches (12' 6"), including load.

"(c) No motor vehicle, commercial motor vehicles, truck-tractor, trailer, or semi-trailer shall exceed a length of thirty-five (35) feet, and no combination of such vehicles coupled together shall exceed a total length of forty-five (45) feet, unless such vehicle or combination of vehicles is operated exclusively within the limits of an incorporated city or town.

"(d) No train or combination of vehicles or vehicle operated alone shall carry any load extending more than (3)

feet beyond the front thereof, nor, except as hereinbefore provided, more than four (4) feet beyond the rear thereof.

"(e) No passenger vehicle shall carry any load extending more than three (3) inches beyond the line of the fenders on the left side of such vehicle, nor extending more than six (6) inches beyond the line of the fenders on the right side thereof; provided, that the total over all width of such passenger vehicle shall in no event exceed ninety-six (96) inches, including any and all such load.

"(f) Immediately upon the taking effect of this Act, it shall thereafter be unlawful for any person to operate or move, or for any owner to cause to be operated or moved, any motor vehicle or combination thereof over the highways of this State which shall have as a load or as a part of the load thereon any product, commodity, goods, wares or merchandise which is contained, boxed, or bound in any container, box or binding containing more than thirty (30) cubic feet and weighing more than five hundred (500) pounds where there are more than fourteen (14) of such containers, boxes or binding being carried as a load on any such vehicle or combination thereof; provided, that no number of any such containers, boxes or bindings shall be carried as the whole or a part of any load exceeding seven thousand (7000) pounds on any such vehicle or combination thereof; and provided, that if this subsection is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares that it would have passed this Act and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that this section be declared unconstitutional; provided, further, that if this Act or any section, subsection, sentence, clause or phrase thereof is held to be unconstitutional and invalid by reason of the inclusion of this section, the Legislature hereby declares that it would have passed this Act and any such section subsection, sentence, clause or phrase thereof without this section.".

Section 4. That Section 4 of said chapter be, and the same is hereby, amended to hereafter read as follows:

"Section 4. Wherever the load or drawbar or coupling on any vehicle shall extend beyond the rear or the bed or body thereof, there shall be displayed at the end of such load or extension, in such position as to be clearly visible at all times from the rear of such load or extension, a red

flag not less than twelve (12) inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load or extension a red light plainly visible under normal atmospheric conditions at least five hundred (500) feet from the rear of such vehicle."

Section 5. That Section 5 of said chapter be, and the same is hereby amended to hereafter read as follows:

"Section 5. No commercial motor vehicle, truck-tractor, trailer, or semi-trailer shall be operated on the public highway outside of the limits of an incorporated city or town with a load exceeding seven thousand (7,000) pounds on any such vehicle or train or combination of vehicles; and no motor vehicle, commercial motor vehicle, truck-tractor, trailer or semi-trailer having a greater weight than six hundred (600) pounds per inch width of tire upon any wheel concentrated upon the surface of the highway shall be operated on the public highways outside of the limits of an incorporated city or town; provided, however, that the provisions of this section shall not become effective until the first day of January, 1932."

Section 6. That Section 5 of said chapter be, and the same is hereby, further amended by adding thereto a new section to be known as Section 5 (a), which shall hereafter read as follows:

"Section 5 (a). Upon application for registration of any commercial motor vehicle, truck-tractor, trailer or semi-trailer, the applicant shall deliver to the tax collector, or one of his duly authorized deputies, an affidavit, duly sworn to before an officer authorized to administer oaths, showing the weight of said vehicle, which affidavit shall be kept on file by the collector. The license receipt issued to the applicant shall also show said weight. A copy of said receipt shall be carried at all times on any such vehicle while same is upon the public highway. Such affidavit, or a certified copy thereof, may be introduced as evidence showing the weight of said vehicle, and such affidavit shall be prima facie evidence of the weight thereof; provided, however, that it may be shown that said affidavit is false or that said weight inserted therein is incorrect."

Section 7. That Section 5 of said chapter be and the same is hereby further amended by adding thereto a new section to be known as Section 5 (b) which shall hereafter read as follows:

"Section 5 (b). The limitations imposed by this Act as to length of vehicle or combination of vehicles and weight of loads and of height of vehicle with load shall not apply to vehicles when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, provided said vehicle does not pass a delivery or receiving point of a common carrier equipped to transport said load, or when used to transport property from the point of origin to point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load; provided, however, that in no event except by special permit, as hereinabove specifically provided, shall the length of said vehicles exceed fifty-five (55) feet or the weight of such loads exceed fourteen thousand (14,000) pounds; and provided, further, that the limitations imposed by this Act upon weight per inch width of tire shall apply to all such vehicles and loads; provided that if this Act or any other section, subsection, sentence, clause or phrase thereof, is held to be unconstitutional and invalid by reason of the inclusion of this section, the Legislature hereby declares that it would have passed this Act and any such section, subsection, sentence, clause or phrase thereof without this section."

Section 8. That Section 7 of said chapter be, and the same is hereby amended to hereafter read as follows:

"Section 7- (a). No motor vehicle shall be driven upon any highway outside of the limits of an incorporated city or town drawing or having attached thereto more than one trailer.

"(b). The drawbar or other connection between any two vehicles, one of which is towing or drawing the other on a highway, shall not exceed twenty (20) feet in length from one vehicle to the other."

Section 9. That Section 8 of said chapter be, and the same is hereby amended to hereafter read as follows:

"Section 8. Rate and speed of vehicle. It shall be unlawful for any person to operate or drive any motor or other vehicle upon the public highways of Texas at a rate of speed in excess of forty-five (45) miles an hour, or drive or operate a motor or other vehicle within the corporate lim-

its of an incorporated city or town or within or through any town or village not incorporated, at a greater rate of speed than twenty (20) miles per hour, provided that it shall be unlawful to operate upon said public highways a commercial motor vehicle as defined in this Act of either a registered or actual gross weight of six thousand (6,000) pounds or less at a rate of speed in excess of forty (40) miles per hour or such vehicle of either a registered or actual gross weight of over six thousand (6,000) pounds, at a rate of speed in excess of twenty-five (25) miles per hour, or within the corporate limits of any incorporated city or town or within or through any town or village not incorporated at a rate of speed in excess of eighteen (18) miles per hour. Provided, further that it shall be unlawful to operate any motor vehicle engaged in this State in the business of transporting passengers for compensation or hire on any highway, road or thoroughfare not privately owned between cities, towns and villages at a rate of speed in excess of forty (40) miles per hour."

Section 10. That Section 9 of said chapter be, and the same is hereby amended to hereafter read as follows:

"Section 9. Every motor vehicle, other than any road-roller, road machinery or farm tractor, having a width at any part in excess of seventy (70) inches shall carry two clearance lamps on the left side of such vehicle, one located at the front and displaying a white light visible under normal atmospheric conditions from a distance of five hundred (500) feet to the front of the vehicle, and the other located at the rear of the vehicle and displaying a red or yellow light visible under like conditions from a distance of five hundred (500) feet to the rear of the vehicle, both of which lights shall be kept lighted while any such vehicle is upon the highway from one-half hour after sunset to one-half hour before sunrise. A motor vehicle requiring clearance lights hereunder may, in lieu of such clearance lights, be equipped with adequate reflectors conforming as to color and marginal location to the requirements for clearance lights. No such reflector shall be deemed adequate unless it is so designed, located as to height and maintained as to be visible for at least two hundred (200) feet when opposed by the light of a motor vehicle displaying lawful, undimmed headlights at night on an unlighted highway. Reflectors herein referred to must be approved by the department as to specifications before they can be

lawfully used on a vehicle, and it shall be unlawful and constitute a misdemeanor to use a reflector on a motor vehicle unless it has been approved by the department, and such approval by the department shall be firmly affixed to such reflector.

"All vehicles not heretofore by law required to be equipped with specified lighted lamps shall carry one or more lighted lamps or lanterns displaying a white light visible under normal atmospheric conditions from a distance of not less than five hundred (500) feet to the front of such vehicle and displaying a red, or yellow light visible under like conditions from a distance of not less than five hundred (500) feet to the rear of such vehicle, which lights shall be kept lighted while the vehicle is upon a highway from one-half hour after sunset to one-half hour before sunrise. Provided, however, that vehicles drawn by animal power may in lieu of such lamps or lanterns be equipped with adequate reflectors.

"Every owner, driver or operator of a vehicle while it is upon the main traveled portion of a highway during the period from one-half hour after sunset to one-half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person upon the highway for a distance of at least two hundred (200) feet ahead, shall keep lighted all lamps or lighting devices with which such vehicle is required to be equipped, whether the vehicle is in motion or not.

"It shall be unlawful for any person to operate or move any vehicle upon a highway with a red light thereon visible directly from the front thereof, except, that this provision shall not apply to law enforcement officers, fire departments and ambulances.

"Every motor vehicle other than a motorcycle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels. Any motor vehicle or combination of motor vehicles, trailer, or semi-trailer or other vehicle, shall be equipped with brakes upon one or

more of such vehicles, adequate to stop such combination of vehicles in dry weather upon a reasonably level surface within a distance of forty-five (45) feet from the spot where such brakes are first applied when such vehicle or combination of vehicles are traveling at a rate of speed of twenty (20) miles per hour.

"Every motor vehicle when operated upon a highway shall be equipped witha horn in good working order capable of emitting sounds audible under normal conditions for a distance of not less than two hundred (200) feet, and it shall be unlawful for any vehicle to be equipped with or for any person to use upon a vehicle any bell, siren, compression or exhaust whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonably loud or harsh sound by means of a horn or other warning device, except that vehicles operated in the performance of duty by law enforcement officers, fire departments and ambulances may attach and use a bell, siren, compression or exhaust whistle.

"Every motor vehicle engaged in the transportation of passengers for hire shall be equipped with at least one quart of chemical type fire extinguisher in good condition and conveniently located for immediate use.

"It shall be unlawful for any person to operate or permit to be operated any commercial motor vehicle of over one ton carrying capacity upon the highway of this State without having first obtained a chauffeur's license as provided in Article 6687 of the Revised Civil Statutes of Texas of 1925."

Section 11. That Section 15 of said chapter be, and the same is hereby amended to hereafter read as follows:

"Sec. 15 (a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Act.

"(b). Any person, corporation or receiver, who violates any provision of this Act shall, upon conviction, be punished by a fine of not more than Two Hundred Dollars ($200.00); for a second conviction within one (1) year thereafter such person, corporation or receiver, shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the County Jail for not ~~more than sixty~~ (60) days or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the second conviction such person, corpora-

tion or receiver shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment in the County Jail for not more than six (6) months, or by both such fine and imprisonment. Provisions hereof with respect to imprisonment shall not be applicable to corporations, but double the fines herein provided for may be imposed against them in lieu of imprisonment.

Section 12. Nothing contained in this Act shall be construed so as to limit, restrict or impair the rights, powers and duties of the governing bodies of cities and towns in this State to continue the exercise of, control over and regulations in respect to streets, alleys and other public places located within the corporate limits of cities and towns, nor to limit or restrict the right of cities and towns to regulate and control traffic upon the streets, alleys and other public places in cities and towns under any law of this State; provided, no city or town shall pass any ordinance or make any regulation establishing any limit or requirement less than is provided for by the terms of this Act.

Section 13. If any section, subsection, clause, sentence or phrase of this Act is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act, and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Section 14. All laws and parts of laws in conflict herewith are hereby repealed.

Section 15. The importance of this measure for the benefit of public safety and protection of the highways creates an emergency and an imperative public necessity requiring the suspension of the Constitutional Rule relating to the reading of bills on three several days in each House; and such Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

APPENDIX B

THE LAW PRIOR TO ADOPTION OF H. B. 336

S. B. No. 11.

An Act further regulating the operation of vehicles on the public highways; limiting the size and weight of vehicles and loads permitted on any public highway; requiring lights on certain vehicles not heretofore by law required to carry lighting equipment; restricting the stopping or parking of a vehicle on the improved portion of a highway; providing for the erection and maintenance of signs, or markers, on the State Highways, prescribing restrictions regarding the speed of any vehicle; prescribing penalties for violations of this Act; providing for appointment of inspectors to enforce the provisions of this Act and other laws relating to vehicles and traffic on the public highway; repealing all laws or parts of laws in conflict herewith; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. The following words and phrases, when used in this Act, shall, for the purpose of this Act, have the meanings respectively ascribed to them in this section as follows:

"Vehicle." Every mechanical device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

"Motor Vehicle." Every vehicle, as herein defined, which is self-propelled.

"Commercial Motor Vehicle." Any motor vehicle other than a motorcycle, designed or used for the transportation of property, including every vehicle used for delivery purposes.

"Truck-tractor." Every motor vehicle designed or used privately for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

"Trailer." Every vehicle without motive power designed or used for carrying property or passengers wholly on its own structure and to be drawn by a motor vehicle.

"Semi-trailer." Every vehicle of the trailer type so designed or used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another motor vehicle.

"Department." The State Highway Department of this State, acting directly or through its duly authorized officers and agents.

Section 2. It shall be lawful and constitute a misdemeanor for any person to drive, operate or move, or for the owner to cause or permit to be driven, operated or moved on any highway, any vehicle or vehicles of a size or weight exceeding the limitations stated in this Act or any vehicle or vehicles which are not so constructed or equipped as required in this Act, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state.

Section 3 (3). No vehicle shall exceed a total outside width, including any load thereon, of 96 inches except that the width of a farm tractor shall not exceed nine feet, and excepting further, that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry and highway building and maintenance machinery temporarily propelled or moved upon the public highway.

(b). No vehicle unladen or with load shall exceed a height of fourteen feet and six inches, including load.

(c). No vehicle shall exceed a length of thirty-five feet, and no combination of vehicles coupled together shall exceed a total length of sixty-five feet, unless said combination is operated exclusively within the limits of an incorporated city or town.

(d). No train of vehicles or vehicle operated alone shall carry any load extending more than three feet beyond the front thereof.

(e). No passenger vehicle shall carry any load extending more than three inches beyond the line of the fenders on the left side of such vehicle, nor extending more than six inches beyond the line of the fender on the right side thereof.

Section 4. Whenever the load or draw bar or coupling on any vehicle shall extend more than four feet beyond the rear or the bed or body thereof, there shall be displayed at the end of such load or extension in such position as to be clearly visible at all times from the rear of such load or extension, a red flag not less than twelve inches both in

length and width, except that between one-half hour after sunset and one-half hour before sunrise, there shall be displayed at the end of any such load or extension a (yellow or red) light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle.

Section 5. No vehicle with four wheels or less, whose gross weight, including load, is more than 22,000 pounds; no vehicle with six wheels, whose gross weight, including load, is more than 30,000 pounds (axles of this type of vehicle to be spaced over 40 inches apart); No vehicle having a greater weight than 16,000 pounds on any one axle; and no vehicle having a greater weight than 700 pounds per inch width of tire upon any wheel concentrated upon the surface of the Highway (said width in the case of solid rubber tires to be measured between the flanges of the rim), shall be permitted or operated on the public highways of this State. When the axles of any vehicle or any combination of vehicles are spaced less than 8 feet apart, the load on any one axle shall not exceed 10,400 pounds, provided, however, that when any vehicle equipped with not more than two axles, shall have one of said axles mounted upon four wheels (two wheels at each end of the axle operating in tandem), the maximum weight permitted on each axle of this type shall not exceed 18,000 pounds.

No commercial motor vehicle, truck, tractor, trailer or semi-trailer shall be operated on the public highway with a gross weight in excess of more than five per cent of its registered gross weight.

Section 6. Any license and weight inspector of the State Highway Department, having reason to believe that the gross weight of a loaded vehicle is unlawful, is authorized to weigh the same either by means of portable or stationary scales, and to require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The inspector may then require the driver or operator to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum gross weight specified by this Act.

Section 7 (a). No motor vehicle shall be driven upon any highway outside of the limits of an incorporated city or town drawing or having attached thereto more than one

other vehicle except that a motor vehicle with semi-trailer, may draw in addition thereto one other vehicle.

(b). The draw bar or other connection between any two vehicles, one of which is towing or drawing the other on a highway, shall not exceed twenty-five feet in length from one vehicle to the other. Whenever such connection consists of a chain, rope or cable, of greater length than ten feet, there shall be displayed upon such connection a red flag or other signal or cloth not less than twelve inches both in length and width.

Section 8. Rate of speed of vehicle. It shall be unlawful for any person to operate or drive any motor or other vehicle upon the public highways of Texas at a rate of speed in excess of Forty-Five miles per hour, or to drive or operate a motor or other vehicle within the corporate limits of an incorporated city or town or within or through any town or village not incorporated, at a greater rate of speed than twenty miles per hour, provided that it shall be unlawful to operate upon said public highways a commercial motor vehicle as defined in this Act of a gross weight including its load of 10,000 pounds or less at a rate of speed in excess of 35 miles per hour, or such vehicle of a gross weight including its load of as much as 10,001 pounds and not more than 16,000 pounds at a rate of speed in excess of 25 miles per hour, or such a vehicle of a gross weight including its load of over 16,001 pounds at a rate of speed in excess of 18 miles per hour. Provided further that it shall be unlawful to operate any motor vehicle engaged in this State in the business of transporting passengers for compensation or hire on any highway, road or thoroughfare not privately owned between cities, towns and villages at a rate of speed in excess of 40 miles per hour.

Section 9. Every motor vehicle, other than any road-roller, road machinery or farm tractor, having a width at any part in excess of eighty inches shall carry two clearance lamps on the left side of such vehicle, one located at the front and displaying a white light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle, and the other located at the rear of the vehicle and displaying a (yellow or red) light visible under like conditions from a distance of 500 feet to the rear of the vehicle, both of which lights shall be kept lighted while any such vehicle is upon a highway from one-half hour after sunset to one-half hour before sunrise.

A motor vehicle requiring clearance lights hereunder may, in lieu of such clearance lights, be equipped with adequate reflectors conforming as to color and marginal location to the requirements for clearance lights. No such reflector shall be deemed adequate unless it is so designed, located as to height and maintained as to be visible for at least two hundred feet when opposed by the light of a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway.

All vehicles not heretofore by law required to be equipped with specified lighted lamps shall carry one or more lighted lamps or lanterns displaying a white light visible under normal atmospheric conditions from a distance of not less than 500 feet to the front of such vehicle and displaying a (yellow or red) light visible under like conditions from a distance of not less than 500 feet to the rear of such vehicle, which light or lights shall be kept lighted while the vehicle is upon a highway from one-half hour after sunset to one-half hour before sunrise. Provided, however, that vehicles drawn by animal power may in lieu of such lamps or lanterns be equipped with reflectors as herein permitted for clearance lights.

Every owner, driver or operator of a vehicle while it is upon the main traveled portion of a highway during the period from one-half hour after sunset to one-half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person upon the highway for a distance of at least 200 feet ahead, shall keep lighted all lamps or lighting devices with which such vehicle is required to be equipped whether the vehicle is in motion or not.

Section 10. No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of any incorporated town or city, when it is possible to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear

view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway.

Whenever any peace officer or license and weight inspector of the Department shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

Section 11. The Department is hereby authorized to classify, designate and mark both intrastate and interstate State Highways lying within the boundaries of this State and to provide a uniform system of marking and signing such highways under the jurisdiction of this State, and such system of marking and signing shall correlate with and so far as possible conform to the system adopted in other states.

Section 12. The Department, with reference to State Highways under its jurisdiction, is hereby authorized to designate main traveled or through highways by erecting at the entrances thereto signs notifying drivers of vehicles to come to a full stop before entering or crossing any such highway; and whenever any such sign has been so erected, it shall be unlawful for the driver or operator of any vehicle to fail to stop in obedience thereto.

Section 13. No unauthorized person shall erect or maintain upon any State Highway any warning or direction sign, marker, signal or light, and no person shall erect or maintain upon any highway any traffic or highway sign or signal bearing thereon any commercial advertising, provided nothing in this section shall be construed to prohibit the erection or maintenance of signs, markers, or signals bearing thereon the name of an organization authorized to erect the same by the Department.

Section 14. Any person who shall deface, injure, knock down or remove any sign, posted as provided in this Act shall be guilty of a misdemeanor.

Section 15 (a). It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Act.

(b). Any person violating any provisions of this Act, shall upon conviction be punished by a fine of not more than two hundred dollars; for a second conviction within one year thereafter such person shall be punished by a fine

of not more than two hundred dollars or by imprisonment for not more than twenty days or by both such fine and imprisonment; upon a third or subsequent conviction within one year after the first conviction such person shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months or by both such fine or imprisonment.

Section 16. To insure the adequate enforcement of this Act and all other laws relating to vehicles and their use on the public highways, the State Highway Department is hereby authorized to employ not exceeding fifty license and weight inspectors, to be known as a State Highway Patrol, who shall be charged with the duty of strictly enforcing said laws, and sufficient funds are hereby appropriated to pay salaries and expenses of such inspectors. Said inspectors, when appointed, shall be given a commission, signed by the Chairman and one other member of the State Highway Commission, and attested by the executive head of this Department; and anywhere in this State they shall have the rights and powers of peace officers generally for the sole and only purpose of the full and complete enforcement of the provisions of this Act and other State laws relating to vehicles and traffic on the public highway.

Section 17. If any part or parts of this Act shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts thereof.

Section 18. Articles 789, 793, 818, 823 and 824 of Chapter 1, Title 13, of the Penal Code of Texas, 1925, and all laws and parts of laws in conflict herewith are hereby repealed.

Section 19. The importance of this measure for the benefit of public safety and protection of the highways and the crowded condition of the calendar creates an emergency and an imperative public necessity requiring the suspension of the Constitutional Rule relating to the reading of bills on three several days in each House; and such rule is hereby suspended, and this Act shall take effect and be in force from and after its passage.

Approved July 3, 1929.